Supreme Court, U.S.
FILED

971609 MAR 30 1998

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No.....

.....

IN THE SUPREME COURT OF THE UNITED STATES
March Term, 1998

.....

Francis osei-Afriyie,

Petitioner,

v.

Grace Ampofoh,

Respondent.

.....

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

.....

PETITION FOR WRIT OF CERTIORARI

Francis Osei-Afriyie
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QUESTIONS PRESENTED

1. WHETHER BY ISSUING AN ORDER THAT A NON-MARITAL PROPERTY (OVER WHICH THE FAMILY COURT ADMITTED IT HAD NO JURISDICTION) BE SOLD AND PROCEEDS USED TO PAY PETITIONER IN A PROPERTY DIVISION PROCEEDING FOLLOWING A DIVORCE WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD, DELAWARE COURTS DENIED PETITIONER HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. WHETHER BY FAILING TO APPLY MANDATORY PROVISIONS UNDER DELAWARE DIVORCE CODE IN A PROPERTY DIVISION FOLLOWING A DIVORCE, DELAWARE COURTS DENIED PETITIONER EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

3. WHETHER BY DENYING PETITIONER PERMISSION TO CALL AND EXAMINE HIS WITNESS(ES), DELAWARE COURTS DENIED HIM A FULL AND FAIR OPPORTUNITY TO LITIGATE AN ISSUE RELATED TO A PROPERTY IN GHANA?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

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IN THE SUPREME COURT OF THE UNITED STATES
MARCH Term, 1998

.....

FRANCIS OSEI-AFRIYIE,

PETITIONER,

V.

GRACE A. AMPOFOH,

RESPONDENT

.....

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

.....

PETITION FOR WRIT OF CERTIORARI

Francis Osei-Afriyie petitions for issuance of a writ of certiorari to review the Delaware Supreme Court's affirmance of the decision and order of the Family Court of the State of Delaware, in and for Kent County.

OPINIONS BELOW

The Orders of the Supreme Court of Delaware(App.16a and 17a) are unreported. The decision of the Family Court of the State of Delaware In and For Ker. County (1a) is also unreported.

JURISDICTION

The Order of the Supreme Court of Delaware was entered on January 7, 1998. Petitioner's timely motion for reargument (18a) was denied on January 26, 1998. The jurisdiction of this Court is invoked under U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The due process provisions of the Delaware Constitution provide in pertinent part:

Article I, Sec. 7.

> In all criminal prosecutions, the accused has the right to be heard...nor shall he be deprived of life, liberty or property, unless by the judgement of his peers or by the law of the land.

Article I, Sec. 9.

> All courts shall be open; and every man for an injury done him in his reputation, person movable or immovable possessions, shall have remedy by the due course of law; and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law.

28 *U.S.C.* Sec. 1257 provides in pertinent part:

> Final judgements or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
> (3) By writ of certiorari, ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or

commission held or authority exercised under, the United States.

Title 13 *Del.C.* Sec. 1509 provides in pertinent part:

> (a) Upon the filing of a petition for divorce or annulment, a preliminary injunction shall be issued against both parties to the action, enjoining them from:
> (1) Transfering, encumbering, concealing or in any way disposing of any property except in the usual course of business or for the necessities of life, and requiring the parties to notify the other of any proposed extraordinary expenditures and to account to the Court for all extraordinary expenditures after the preliminary injunction becomes effective...

Title 13 *Del.C.* Sec. 1513 states, in pertinent part:

> ``(a) In a proceeding for divorce or annulment, the Court shall, upon request of either party, equitably divide, distribute and assign the marital property between the parties without regard to misconduct, in such proportions as the Court deems just after considering all relevant factors including:

(6) The contribution or dissipation of each party, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker or husband.

(b) For purposes of this chapter only, ``marital property'' means all property acquired by either party subsequent to the marriage except:
(1) Property acquired by an individual spouse by bequest,devise or decent or by gift...;
(2) Property acquired in exchange for property acquired prior to the marriage;
(3) Property excluded by valid agreement of the parties; and
(4) The increase in value of property acquired prior to the marriage.
(c) All property acquired by either party subsequent to the marriage is presumed to be marital property regardless of whether title is held individually in common or tenancy by the entirety. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in paragraphs (1) through (4) of subsection (b) of this section.

STATEMENT

Petitioner was respondent's boy-friend from 1967 until he left Ghana for overseas in 1973. In 1980, he returned to Ghana to teach and married respondent. He returned to Canada for further studies in 1980. Respondent joined him in 1981. But petitioner had to buy her the airline ticket since she did not have the financial resources to purchase one.

Upon arrival in Canada, respondent informed petitioner that the parties had a daughter in 1973 (23a) and the daughter was being raised by the maternal grandparents. The parties provided for the `daughter'. In early 1990s, petitioner found out that the parties did not have a daughter in Ghana (58a). Indeed, the so-called `daughter' was respondent's sister and it was a scheme designed by respondent to constantly siphon off money to her parents (30a,44a,49a,51a,54a-61a; brief, pp.3-4), and to later petition the Immigration and Naturalization Service (INS) to bring her sister into the U.S. under a classification for which the sister would not qualify under normal circumstances. In August 1996, respondent filed a petition with the INS to bring the sister into the U.S. as her daughter. Brief, pp.3-4.

During the marriage, the parties had joint and separate accounts from which

they acquired their assets and maintained their livelihood. Respondent paid $2,541.04 more than petitioner from her separate account to acquire the marital home. Petitioner also bought the funiture in the marital home from his separate account. He also paid over $3,000 more than respondent to acquire the 25 and 17 Spruance Road properties from his separate account. In addition, he spent money from his account to maintain and repair all the properties (24a-26a). He also was solely responsible for the family's medical and dental expenses throughout the parties' stay in CANADA (From April 1981-April 1985). From April 1981 until August 1982, when the parties lived on the campus of Simon Frazer University petitioner was responsible for all expenses. Indeed, in her answering brief, p.3, she stated:

> ``Initially Appellant contributed more towards these expenses but throughout most, and especially, the latter half of the marriage, Appellee contributed equally to not only the monthly living expenses but also debts created to finance the acquisition of capital assets.''

Petitioner walked 3 1/2 miles (one- way) down a steep hill with respondent for her to catch the bus at 6:30 a.m. (5 days a week) at the nearest bus stop to go to work. The hill was so steep that after walking petitioner became tired (26a)

and somtimes missed his 8:00a.m. classes that jeopardized his Ph.D. program. Lastly,when respondent became unemployed in 1984 in Canada for about 7 months(69a), petitioner was primarily responsible for all expenses until the parties moved to the U.S. in April 1985.

Over the years, respondent sent money to Ghana to take care of a daughter who turned out not to be our daughter. She sometimes collected the rent on the parties' rental properties and deposited it into her separate account. Respondent also withdrew over $4,800 from a joint account and deposited it into her individual account (41a-49a). The 17 Spruance property was purchased on September 23, 1992. By September 28, 1992 respondent had told petitioner that she was not interested in that property, demanded her contribution of $1,260 and had it refunded to her. Petitioner's contribution towards the downpayment was $6,723.95. Brief, pp.9-10; From the time she had her contribution refunded to her until she again changed her mind and became interested in that property, petitioner was solely responsible for the mortgage payments, maintenance and repairs on it.

The Decision and Order appealed from purported to `equitably' divide the marital asset. In his appeal, petitioner argued that, **in many instances**, the Family Court's Decision and Order

violated his rights to due process and equal protection of the laws under the 14th Amendment to the U.S. Constitution. **Some aspects of the Family Court's decision and order and rulings require emphasis.** For instance, the court issued an order on a non-marital property over which it had no jurisdiction (4a-5a,15a) without giving petitioner notice and opportunity to be heard. Also, the Court failed to give petitioner equal protection of the laws by not placing upon respondent the burden of showing why an asset acquired during marriage was to be excluded from division contrary to the mandatory statute (13a-14a,p.5). Lastly, the court ruled that it would consider in the property division, contributions respondent had made towards the construction of a property in Ghana (52a-61a) as well as some expenses petitioner had incurred (68a-69a). But the court failed to mention those, let alone consider them in the property division (13a-15a).

On the first issue, respondent argued that the issue was moot because on the day her brief was due (November 17,1997), she wrote a check for $26,024 to be given to petitioner. Petitioner responded that the issue was not moot. He refused to accept the check arguing, among other things, that the $26,024 was being disputed and it was left to the Delaware Supreme to decide whether the Order on a

non-marital property without a hearing violated petitioner's constitutional rights. She did not respond to the second issue. On the third issue, she responded that the trial court did not`forget' about the ruling but she could not show how those sums of money were distributed.

Upon review, Delaware Supreme Court affirmed the Family Court's Decision and Order without citing any authority. Petitioner made a motion for reargument (18a-22a) but it was denied (17a).

This Court should grant a writ of certiorari to correct these egregious constitutional violations, and to resolve two issues of continuing importance- (1) under what circumstances may courts issue orders on properties over which they have no jurisdiction without a hearing?, and whether courts may decline to give citizens equal protection of the laws?

A. Proceedings in the Family Court

In August 1995, the Family Court exercised jurisdiction over ancillary matters following a divorce. The parties engaged in discovery. Respondent requested materials from petitioner on two occasions and they were turned over to her. Petitioner, in turn, requested similar materials from respondent but she refused to produce them. As a result, petitioner had to file two motions for production of documents and the court

granted the motions and issued two orders (July 13 and November 15). Respondent complied with the 1st court order but she failed to fully comply with the 2nd order. Specifically, she refused a produce bank statements from Wilmington Trust on account #2704-5987 (26a-28a). Petitioner sent correspondence on non-compliance of the court order to the court but judging from the court's decision, (13a-15a), that court did nothing.

During the hearing, the court made some important rulings which petitioner relied upon (34a, 54a-55a; brief, pp.32-33). But the court failed to **follow** or comply with its own rulings in its Decision and Order. This was a complete surprise to petitioner that could not have been anticipated based on *Eberly v. Eberly*, 489 A.2d 433, 443(1985). Also, respondent withdrew her request for attorney's fees at the conclusion of the hearing (68a) and petitioner requested the award of attorney's fees from respondent (68a) for (1) rejecting an appraisal submitted by his attorney from Mr. Owens and respondent accepting the appraisal when Mr. Owens appeared in court to testify and (2) for being unreasonable and uncooperative throughout the litigation. **But the court issued an order (14a), on respondent's request which had been withdrawn** and ignored petitioner's request (29a,33a-41a). Such

a conduct is grossly unfair and against 13 *Del.C.* Sec. 1513(a), p.4.

ARGUMENT

It is well settled under the Delaware Divorce and Annulment Act, 13 Del. C., Chapter 15, and repeated in numerous cases that: all property acquired by either spouse during the marriage, regardless of how such property be titled, is ``presumed'' to be marital property, subject to division by the Family Court upon divorce. 13 Del.C. Sec. 1513(c), p.4. Section 1513(b), however, provides that the marital property presumption is subject to four exceptions. Those exceptions are:

(1) Property acquired by an individual spouse by bequest,devise or decent or by gift...;

(2) Property acquired in exchange for property acquired prior to the marriage;

(3) Property excluded by valid agreement of the parties; and

(4) The increase in value of property acquired prior to the marriage.

The burden of overcoming this statutory presumption and proving that the property sought to be excluded falls within one of the four statutory exceptions is placed upon the party seeking to exclude the property from division between the parties. For consistency in the

application of this mandatory statute, see *Lynn v. Gallagher*, 526 A.2d 878, at 882 (Del. Supr.1987); *Gregg v. Gregg*, 510 A.2d 474, 478 (Del. Supr. 1986); *Frank G.W. v. Carol M.V.*, 457 A.2d 715, 722 (Del. Supr. 1983); *E.C.W. v. M.A.W.*, 419 A.2d 934, 937, (Del. Supr. 1980); *Husband R.T.G. v. Wife G.K.G*, 410 A.2d 155, 159 (Del. Supr. 1979); *J.D.P. v. F.J.H.*, 399 A.2d 207, 211 (Del. Supr. 1979).

But the Family Court failed to require respondent to carry the burden of showing that assets she requested be excluded from division fell under any of the four statutory exclusions. Instead, that court stated the following in its decision:

> Although individual bank accounts and pension plans are considered marital property, in this case, in light of the fact each party managed their separate accounts and finances for the duration of the marriage, it would be inequitable to now attempt to split the accounts and equalize the balances to the detriment of the more frugal party.Therefore, each party shall maintain their individual accounts titled in their names... Each party shall retain 100% their own pension and deferred compensation plans...(13a-14a).

On appeal petitioner argued that the above rationale deprived him of equal protection of the laws guaranteed under the 14th Amendment to the Constitution and of a fair share of the marital asset.

He argued that under Delaware law, the fact that an individual spouse may have control over marital property, and determine its placement into either a joint or separate account, or into other property, is not dispositive of the legal issue of chracterization for the purposes of property division, brief pp.11-15. See *Halsey v. Charlotte,* 419 A.2d 962, 965(Del. Fam. Ct. 1980). **This case has NEVER been OVERRULED.** Hence, marital assets in Delaware are awarded not on the basis of who controls or manages them and courts have consistently considered personal accounts, stocks, cars etc. as marital asset subject to division. *Wright v. Wright,* 469 A2d 803, 806 (Del. Fam. Ct. 1983); *Lynn v. Gallagher,* supra.). Brief, pp.14-15, Reply brief, pp. 2-3. See *Diamond National Corp. v. State Equalization Board,* 425 U.S. 268, 268-270 (1976) where a consistent construction and application of California statute was given weight by this Court. But without statutory authority from the General Assembly, the Family Court had **manufactured** an **additional** property division statute based on ``control'' and ``management'' **applied only** in this case despite consistent application of **existing** statute by Delaware courts. **This departure from applying the existing statute was discrimatory and deserves this Court's attention.**

Second, respondent admitted at trial that in March 1996 she unilaterally withdrew over $4,800 from the parties joint account (41a-49a) **(IN VIOLATION OF 13 Del C. Sec. 1509, p.4)** and collected the rent on all the four rental properties from April 1996 to June 1996 (31a-32a) and deposited the sum into her individual account. She also testified that petitioner did repairs on the properties and installed a fence on 13 and 15 Spruance properties (25a-26a). Again, she admitted in open court that she periodically sent money from her individual account to her parents for their upkeep, contributed to buy a parcel of land in GHANA and contributed at least another $5,000 to construct a building on that land. Lastly, respondent initially denied that the parties had joint accounts until they opened one in 1991. But upon cross-examination and after production of evidence she was unwillingly forced to admit that the parties had 3 accounts at least since 1988 and before 1991. Finally, she testified that petitioner paid the rent, utilities, medical and dental expenses when she first arrived in CANADA and the parties lived on the university campus until they left and rented an apartment downtown (60a-61a). Respondent arrived in Canada in April 1981 and the parties moved downtown in August 1982.

Petitioner again argued on appeal that the sums of money in individual accounts and contributions respondent sent to Ghana should have been subject to division by the Family court.

13 *Del. C.* Sec. 1513(a) imposes on the Family Court the duty to ``equitably divide'' all marital property after considering ``all relevant factors including'' Sec. 1513(a)(6), p.4. Since the term dissipation[1] is not defined by statute, reference must be made to its commonly accepted meaning, considering the context in which the word is used in our statute.

In the context of Sec. 1513(a)(6), ``dissipation'' is used as an antonym for the contribution...of each party in the acquisition, preservation... of the marital property... and one party's ``dissipation'' must be weighed against the other party's ``contribution'' and then related to the allocation of marital property. *E.E.C.*, id. 457 A.2d 688, 695 (Del. Supr. 1983). Petitioner spent the money in his individual account on the rental properties, the marital home and on the family.

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[1] Dissipation n.1.a. The act of scattering. b. The condition of being scattered; dispersion. 2. Wasteful consumption or expenditure. 3. Dissolute indulgence in pleasure; intemperance. 4. An amusement; a diversion.

The American Heritage Dictionary of the English Language.

Clearly then, evidence of a party's `dissipation' or ``diversion''of marital income or other marital property is a statutory factor to be considered in arriving at an equitable division of the marital property. In *A.I.D. v. P.M.D.*, 408 A.2d 940, 943 (Del.Supr. 1979), that court recognized Sec. 1513(a)(6) as a`legislative mandate to consider dissipated property when an equitable division of property is to be made...'

Indeed, after the Family Court had ruled that the Ghana house was ``non-marital'' (a ruling which was objected to and which petitioner will shortly discuss), and without explicit reference to 13 *Del. C.* 1513(a)(6), it ruled that it would consider as factors to be weighed in effecting an equitable division of property between the parties, respondent's $5,000 contribution plus any additional contribution adduced at trial which she might have made to that house (54a). The court also ruled that it would consider the circumstances under which Mr. Owens appeared in Court in its distribution (68a-69a). But, there in nothing in the Court's decision and order that it did so. Surely, the Court should have considered the portion of marital property that respondent contributed to the Ghana house,the fee petitioner paid Mr. Owens to go to court as well as petitioner's expenses that went to preserving the marital property.

See *Eberly v. Eberly*, 489 A.2d 433, 443(1985). But again, the Family court did not do that.

Notwithstanding all the above, the Family Court distributed the marital estate as found at 13a-15a. Viewing the court's decision and order in the context of the record, petitioner argued that the Family Court's decision was inequitable since it denied him equal protection of the laws by failing to consider all mandatory and pertinent statutory factors set out in 13 *Del. C.* Secs. 1509 and 1513. This is similar to *E.E.C.*, id. 457 A. 2d 688, at 699. Therein, that court reversed a Family court's property division since it was made without due regard for all pertinent statutory factors set out in 13 *Del. C.* Sec. 1513(a)1 through (11). But the Delaware Supreme Court affirmed the lower court's decision and order. **However, this case** - in which petitioner prays for a writ to review such affirmance **so seriously infringes constitutional and statutory rights**, where they raise on their face a substantial question of whether the Family court acted within its statutory and constitutional mandates - **is a proper occasion for this Court to make clear that courts do have and must act within the confines of the law.**

Petitioner was denied a full and fair hearing at the Family Court.

This Court has set forth some factors which a court might examine to determine whether a party had been afforded a``full and fair opportunity'' to litigate a particular issue. Among them are:(1) whether the court purported to apply the applicable legal standards and two(2) whether without fault of his own the party was deprived of crucial evidence or witnesses in the prior litigation. *Blonder-Tongue v. University Foundation,* 402 U.S. 313, 332-333, 91 S.Ct. 1434, 28 L.Ed 788(1971*); Studeingesellschaft, mbl v. USX Corp.*, 675 F. Supp. 182 (D.Del.1987).

The record shows that the Family Court failed to apply all the pertinent statutory factors embodied in 13 Del. C. Sec.1513. The record also shows that petitioner was denied a request to call and examine his witnesses who were in Ghana about the ownership and value of a property in Ghana.

The facts are the following:

On July 3, 1996 at a hearing on Motion to Withdraw as Counsel and Motion for Production of Document, the Family Court stated that because the among in controversy on the Ghana property was small, it would not be prudent to bring witnesses from Ghana into the U.S. to testify. Following the hearing,

respondent's previous counsel sent a letter to petitioner in which she stated: ``I think it makes a great deal of sense to having any witnesses from Ghana testify by phone.'' app. to petitioner's brief, p.188. Petitioner agreed with her in his response, app.to brief,p. 191.

Petitioner stated in his 52D submission that he would call his witnesses from Ghana to testify by phone. The court was again contacted by phone and petitioner was informed that he would be responsible for the phone bill. He agreed to pay the phone bill the court would incur.

However, at trial counsel opposed calling the witnesses to testify by phone on the grounds of relevancy and violation of respondent's rights under the 6th Amendment to the Constitution. The court then denied petitioner's request. (47a-48a,54a). Petitioner immediately objected to the court's ruling, arguing that there are exceptions to rules of evidence and the 6th Amendment Confrontation Clause. See D.R.E 804 (a)(5); *United States v. Weber*, 437 F. 2d 327, 339; *Ohio v. Roberts*, 448 U.S. 56 (1980); *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

Again on appeal, petitioner argued that he was denied a ``full and fair opportunity'' to trial on the Ghana property citing exceptions to rules of evidence and the 6th Amendment Confrontation Clause. Respondent also advanced the same argument as was done at

trial. The Delaware Supreme accepted respondent's argument by its affirmance of the trial court's decision and order. It is important to note that the Family court **NEVER** mentioned the Ghana property, let alone respondent's contribution to it in its decision and order. The court totally ignored it as if petitioner had not requested that it be included in the property division **and** as if that court had not ruled on it as previously indicated,(54a);p.17. That was a serious omission and a miscarriage of justice.

It is again important to mention that petitioner testified that respondent had told him that she was building a house in Ghana. The record also shows that on June 11, 1993, approximately two years before the parties' divorce, respondent had written a letter to Mr. Sarfo soliciting his help to complete her house in Ghana (69a-70a). Respondent testified that in November 1993, while in Ghana, she had a conversation with Dr. Michael Owusu-Akyaw about the house in Ghana and asked him to supervise its completion in her absence. She gave money to Dr. Owusu-Akyaw to pay the workers upon its satisfactory completion. In June 1994, while on an assignment in the U.S., Dr. Owusu-Akyaw wrote to the parties stating: ``...As I indicated in my letter, I supervised and paid the workers who worked on your wife's building; the job was well done.''

Respondent sent Dr. Owusu-Akyaw $50 as appreciation for honoring his promise. Copies of respondent's letter to Mr. Sarfo and Mr. Sarfo's response as well as Dr. Owusu-Akyaw's letter were on record at time of trial, app. to brief, pp. 180-184. Petitioner believes he was entitled, in the interest of a fair trial, to call at least Dr. Owusu-Akyaw to question him and ascertain the nature of his conversation with respondent and on what basis he stated ``your wife's building'' as indicated above. That content of the conversation between respondent and Dr. Owusu-Akyaw would have been relevant to establish ownership of that property. Also, it would have corroborated respondent's statement in her letter to Mr. Sarfo stating:

``... I have been strongly advised by Osei-Yaw to contact you for assisting me to complete my house in Nyinahin. I shall be sending you money if you offer this important help in my life...''

In fact, the D.C. Circuit in *U.S. v. Paxton*, 861 F. 2d 730, 734 (1988), ruled that a statement by a party's agent or servant concerning a matter within the scope of agency or employment, made during the existence of the relationship is admissible under Fed. R.Evid. 801(d)(2) (quoting the 10th Circuit and this Court). See *United States v. Young*, 736 F.2d 565, 567(10th Cir. 1983), 470 U.S. 1. Consequently, the denial by the

Family court of the request to call witnesses under the protection of the 6th Amendment simultaneously deprived petitioner of his rights to a fair and full trial. This Court should examine whether petitioner had a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time.

THE DENIAL OF DUE PROCESS OF LAW ON THE HANCOCK PROPERTY

The Family court had stated in open court that it had no jurisdiction over the non-marital Hancock property . Also, see decision and order (4a-5a). But in its Order (15a), the court stated that to equalize payment, respondent was to pay petitioner $26,024 two months after the sale of the non-marital property and distribution of proceeds. The order gave respondent unlimited duration of time to pay petitioner which was a violation of his constitutional rights. See *Eberly*, id. 442. Nevertheless, **when a statute limits the jurisdiction of a court, it must be strictly interpreted.** Emphasis added. See *Sanders v. Sanders*, 570 A.2d 1189, 1193(Del. Supr.1990), quoting *Theisen v. Hoey*, 51 A.2d 61 (Del. Ch., 1947). The court issued the order without a hearing despite the substantial amount of liquid assets awarded respondent **and despite** the fact that she possessed no

interest legal or otherwise in that property as of June 4, 1997. On that date, petitioner bought respondent out of the property by securing a loan of $45,000 to pay her. Therefore, the Family court's order should not be treated lightly by this Court. The consequence of not following the statute (13 *Del.C.* Sec.1513) was to violate petitioner's rights.

In response to petitioner's argument, respondent argued that the merit of petitioner's claim was moot because on the day her answering brief was due(November 17, 1997), she wrote a check for $26,024 to be given to petitioner. Petitioner did not accept the check. Instead, he argued in his reply brief that the Family court's property division was inequitable and the Delaware Supreme Court should determine whether the trial court's order on the non-marital property violated his constitutional rights. Why did respondent delay from June 1977 until November 1997 to attempt to pay petitioner when the latter paid exorbitant interest on the loan while the former earned interest on the $45,000?

Cases may become moot because of a change in the law, or in the status of the parties, or because of some act of one of the parties which dissolves the controversy. *Commercial Cable Co. v. Burleson*, 250 U.S. 360 (1919); *County of Los Angeles v. Davis*, 440 U.S. 625(1979).

But this Court has developed several exceptions which operate to prevent many of the cases in which mootness is alleged from being in law moot. Among them is the ``voluntary cessation'' doctrine which focuses on whether challenged conduct which has lapsed is likely to recur. *Southern Pacific Co. v. ICC*, 219 U.S. 433, 452(1911). Thus, cessation of the challenged activity by the voluntary choice of the person engaging in it, especially if he contends that he was properly engaging in it, will moot the case if it can be said with assurance``that `there is no reasonable expectation that the wrong will be repeated.' '' *United States v. W.T. Grant co.*, 345 U.S. 629, 633(1953)(quoting *United States v. Aluminium Co.* of America, 148 F.2d 416, 448(C.A.2 1945). Otherwise, ``the defendant is free to return to his old ways'' and this fact would be enough to prevent mootness because of the ``**public interest in having the legality of the practices settled.**'' *United States v. W.T. Grant Co.* id., 632. Emphasis added.

In the instant case, the Family court's conduct has been sanctioned by the Delaware Supreme Court and there is no assurance that that court would not issue an order to affect petitioner's or another party's property interest over

which that court has no jurisdiction.[2] Consequently, the order is not moot. This order was issued without a hearing and denied petitioner opportunity to be heard in defense of his interest. Hence, the Family court acted outside the framework of applicable law and totally disregarded petitioner's due process rights under the 14th Amendment.

Finally, petitioner argued on appeal that the Family court's conclusions were against the weight of the evidence and unsupported by the law. Pages 25-32 of brief. For instance, the court stated that the Delaware Health Resources Board has been subject to several sunset dates that have previously been amended by the General Assembly...''(8a). That statement was totally unfounded. One only needs to examine the history of Chapter 93 of Title 16. The 134th General Assembly amended the original 1978 statute(61 *Del. Laws* ch. 393) in 1987 with 66 *Del. Laws* ch.90. The 136th General Assembly revised some provisions of ch. 93 in 1991. See 68 *Del. Laws* ch.29. In 1994, the 137th General Assembly gave shape to the current Chapter 93 of Title 16 with 69 *Del. Laws* ch. 251. It is in this enactment that the sunset provisions,

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[2] A court order becomes the law of the case. See, Joseph(B.P.) v. Kathleen(M.P.), 469 A.2d 800, 802 (1983). This law should not be allowed to stand.

ch.93, sectiom 9311, first appear. Section 9311 states:

> The Board and all provisions of this chapter shall sunset June 30, 1996. Prior to this date, the Delaware Health Care Commission or its successor agency shall have completed a review of the effectiveness of Certificate of Need.

The General Assembly first amended Section 9311 in June 1996. See 70 *Del. Laws*, ch.446. That amendment implements the Commission's recommendations in response to a directive of the 137th General Assembly and sunsets the Board. The Family court also concluded that wife was ``always employed during the entire length of the marriage'' (8a). That fact was totally incorrect. In fact, respondent testified that she did not work for 7 months in 1984(69a).

B. Proceedings in Delaware Supreme Court

On appeal, as previously stated, petitioner argued that the Family court acted outside the confines of its legislative mandate, divided the marital estate without due regard for all pertinent statutory factors set out in 13 *Del. C.* Sec. 1513, failed to comply with the Supreme Court's own procedural guidelines for property division set out in *Husband R.T.G. v. Wife G.K.G.*, 410 A.2d 155(1979) and denied petitioner due process of law and equal protection of

the laws under both the 14th Amendment to the U.S. Constitution and the State of Delaware Constitution, Article I, Secs. 7&9. Surprisingly, however, the Supreme Court affirmed the Family court's denial of petitioner's Constitutional rights and, thereby, renounced its power to protect petitioner's rights and privileges secured by the 14th Amendment and the Delaware Constitution. Petitioner's motion for reargument (18a-22a) was equally denied (17a). The affirmance of the Family court's decision and order is totally inconsistent with that court's own cases cited in this petition.

For instance, in *Abel G.S. v. Badrban*, 453 A.2d 94, 97 (Del. Supr. 1982), that Court gave the following warning to the Family Court:

> The Court and its power are solely the result of statute, and when proceeding on what is perceived to be an equitable basis, the trial judge could not do so in disregard of the law or in violation of the rights of the litigants.

Also, in *R.T.G.*, 410 A.2d 153, 158, id. the same court stated:

> It is, therefore, essential in the public interest that Judges of the court who exercise its statutory

power apply the same basic approach in the administration of Sec. 1513.

If a Family Court Judge failed to do the above, that Court continued,

``... We cannot avoid our responsibility for consistency in the administration of the law.''

Conclusion

For reasons expressed and the authorities cited herein, a case has, therefore, been made that the Delaware Supreme Court sanctioned a lower court's violation of petitioner's 14th Amendment constitutional rights and avoided its responsibility to oversee consistency in the administration of the law. This Court must grant a writ of certiorari and exercise its supervisory power to give back to petitioner his rights denied him by Delaware courts. For, there is nothing more fundamental or basic than one's constitutional rights to due process of law and equal protection of the laws. They are the essence of our legal system and the cornerstone of the public's trust and respect for that system. They must be protected and protected by this Court.[3]

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[3] Petitioner contacted respondent's attorney to file a joint appendix but he declined. He indicated respondent would file her own appendix. Petitioner accepted a check for $26,024 on 3/9/98 from respondent.

Francis Osei-Afriyie
P.O. Box 185
Dover, DE, 19903-0185
Pro-se Petitioner
Non-attorney
(302) 678-5733

March 1998
27th

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THE FAMILY COURT OF THE STATE OF DELAWARE
In and For Kent County

FRANCIS OSEI-AFRIYIE,	
PETITIONER	File No(s)
PRO-SE	CK95-3472
	CPI No(s)
V.	95-13580
GRACE A. AMPOFOH,	Nature of
RESPONDENT	Proceeding:
Attorney:	ANCILLARY
Gerald I. Street,ESQ.	(Property
	Division,Court
	Costs &
	Attorney's Fees)
	Date of Hearing
	3/25/97&3/26/97
	Decision Date
	6/6/97

Decision Reserved

Before the HONORABLE WILLIAM N. NICHOLAS, JUDGE of the Family Court of the State of Delaware:

A hearing was held on ancillary matters. The Petitioner, Francis Osei-Afriyie, (hereinafter, ``Husband'') appeared *pro se*. The Respondent, Grace Ampofoh, (hereinafter, ``Wife'') appeared by and through her attorney, Gerald I. Street, Esquire. The ancillary matters contested at trial consisted of property

division, attorney's fees and Court costs. At the conclusion of the hearing, the Court reserved decision. This is the Court's decision.

PROPERTY DIVISION

Assets

The Court finds the following marital assets and their respective values:

(1) Marital Residence. The parties own a marital home located at 153 Royal Grant Way, Dover, Delaware purchased in 1988. The parties have stipulated that the home has a current value of $128,000. There is a mortgage balance of $68,223.81 as of March 24, 1997, so the equity in the home is approximately $59,776.19, excluding settlement costs. Wife has requested she be awarded the marital residence.

(2) Rental Properties. The parties jointly own several rental properties. Apart from the testimony of the parties and their Rule 52(d) submissions, for the most part, there was insufficient documentary evidence to ascertain either the fair market value or the current mortgage balances on these properties. Therefore, the values assigned to these properties are largely taken from the information presented in the parties' 52(d) submissions.

(a) 25 Spruance Road-Purchased in May 1991 for $60,000.00. The current fair

market value is also approximately $60,000.00. There is mortgage on the property held by Wells Fargo with a balance of approximately $40,200.00. and 24 years remaining on the mortgage. The equity in the property, excluding settlement costs, is approximately $19,800.00. The current monthly rent received by the parties is $600.00. Per an agreement between the parties, Wife manages this property pending disposition of the ancillary proceedings.

(b) 15 Spruance Road -Purchased in October 1991 for $48,500.00. The current fair market value is approximately $57,500.00. There is a first mortagage on the property held by Fleet Mortgage with a balance of approximately $32,500.00 and 24 years remaining on the mortgage. Apparently, a second mortgage or equity loan held by CoreStates Bank also exists on the property with two or more years remaining and a remaining balance of approximately $447.00 as of March 1997. Therefore, the equity in the property, excluding settlement costs, is approximately $24,553.00. The current rent received by the parties is $590.00. Currently, Husband manages and maintains this property.

(c) 13 Spruance Road -Purchased in February 1992 for $45,600.00. The current fair market value is approximately $60,250.00. There is first mortgage on the property held by Boatman Mortgage

with a balance of approximately $31,800.00. and a 25 years remaining on the mortgage. A second mortgage or equity loan held by PNC Bank also exits on the property with a balance of approximately $9.926.00 as of March 1997 with five more years remaining. The current monthly rent received by the parties is $600.00. Currently, Husband manages this property. 13 and 15 Spruance are a connected duplex.[1]

(d) 17 Spruance Road- Purchased in September 1992 for $46,665.00. The current market value is approximately $63,750.00.[2] There is first mortgage on the property held by CoreStates Bank with a balance of approximately $48,200.00 as of March 1997 with 25 years remaining. The current monthly rent received by the parties is $675.00. Pursuant to an agreement of the parties, Wife manages this property.

The parties also jointly own property located at 1411 S. Hancock Road, Dover, Delaware. This property was purchased jointly by the parties in January 1996 after the parties' divorce. As stated on the record during the trial, this property was not purchased or acquired

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[1] The average of Husband' value of $55,000 and Wife's value of $60,000.

[2] The average of Husband's value of $62,500 and Wife's value of 465,000.

during the marriage and therefore, this court has no jurisdiction over its disposition and this property is therefore not a part of this decision.

(3) Pension and Deferred Compensation Plans. As State of Delaware employees, both parties have their own individual pension and deferred compensation plans. The value of the parties' pension plans are unknown at this time. The value of Husband's deferred compensation plan is approximately $7,470.69 as seth forth in his 52(d) submission. Wife's deferred compensation plan has an approximate value of $13,400.00

(4) Motor Vehicles The parties own a 1991 Toyota Corolla currently in the possession of Husband. The parties'1996 Toyota Corolla is in Wife's possession. There was insufficient evidence produced at trial for the Court to assign a value to these vehicles.

(5) Bank Accounts The parties maintained the following bank accounts:

(a) Husband's PNC checking account, #9524-4211, with an approximate balance of $2,527.44 as of August 1995, the date of divorce.

(b) Husband's Mellon Bank account, #1200-049-8, with an approximate balanceof $4,544.82 as of August 1995.

(c) Husband's Merrill-Lynch account, #323-18903-5, with an approximate balance of $5,112.59 as of August 1995.

(d) Husband's PNC CD purchased in February 1995 with an appproximate value of $10,000.00.
(e) Wife's PNC checking account, #0100-5395, with an approximate balance of $445.21 as of August 1995.
(f) Wife's PNC saving account, #0100-5392, having an approximate balance of $7,659.73 as of August 1995.
(g) Wife's Wilmington Trust CD having an approximate value of $7,659.73 as of February 1996.
(h) Wife's PNC CD, #D618765, in the of $9,198.24, closed as of November 1995.
(i) Wife's PNC CD, #D622160, in the of $10,611.38, closed as of March 1996.

Discussion

This Court must equitably divide, distribute and assign the marital estate between the parties after considering specific enumerated factors. *13Del.C* Sec. 1513. The Court has reviewed those factors and finds the following controlling:

1. The length of the marriage. The parties were married on February 10, 1980, separated on January 2, 1995 and a final divorce decree entered on August 3, 1995 thereby making the length of the marriage a little over fifteen (15) years.

2. The Age, Health, Station, Amount and Sources of Income, Vocational Skills, Employability, Estate, Liabilities and

Needs of Each of the Parties. Husband is forty-nine(49) years of age and suffers from several health problems including hypertension, gouty arthritis, osteosrthritis, gastroesophageal reflux, plantar fasciitis and tendonitis. Husband is on medication for these conditions and although he claims that at times these conditions impair his ability to perform basic daily activities, these conditions have not interfered to do minor handiwork and repairs to the rental properties. Nor did Husband dispute the fact that despite these health problems, he has missed only two days of work in the past eight years.

Husband has a Master's degree in Economics and a Master's degree in Health Administration. He is currently employed as a senior health planner for the State of Delaware, Bureau of Health Planning and Resources Management, earning approximately $3,000.00 monthly. As a senior health planner, Husband is responsible for examining Certificate of Need (``CON'') applications and reporting to the Delaware Health Resources Board. The Board is subject to a sunset provision pursuant to 16 *Del C.* Sec.9311 and Husband asserts that he will no longer be employed as of JUNE 30, 1999.

Wife is forty-five (45) years of age and suffers from diabetes and arthritis. Wife takes insulin to control her diabetes. Wife is a registered nurse and works at the Delaware Hospital for the

Chronically III. She earns approximately $3,900.00 monthly.

3. Whether the Property Award is in Lieu of or in Addition to Alimony. Neither party has requested alimony so this factor is not relevant to this decision.

4. The Opportunity of Each for Future Acquisitions of Capital Assets and Income. Both parties are currently employed and have the opportunity to acquire future assets although Wife does earn the higher salary. Husband's claim that he will be out of job when the Delaware Health Resources Board sunsets in June 1999 is purely speculative. The Board has been subject to several earlier sunset dates that have been amended by the General Assembly. Futhermore, even if the Board is eliminated in 1999 that does not necessarily mean that Husband will be out of a job with the Bureau of Health Planning and Resources Mnagement or be unable to find appropriate employment. He has a Master's degree in both Economics and Health Administration plus eleven years of experience in the health administration field. Additionally, both Wife and Husband have demonstrated their ability to acquire additional assets. Both parties have acquired additional real estate and rental properties post-divorce, purchased jointly and individually.

5. The Contribution or Dissipation of Each Party in the Acquisition,

Preservation, Depreciation or Appreciation of the Marital Property, Including the Contribution of a Party as Homemaker or Husband. The majority of testimony from the parties was spent on this issue. It was undisputed by the parties that from of the marriage it was understood that there would be an equal contribution made by both parties towards the acquisition of all marital assets and payments towards the marital debts and expenses. Both parties were employed throughout the marriage. Wife began working as early as her first day in Canada after coming over Ghana, Africa. The parties testified that they maintained separate bank accounts, depositing their respective salaries into their accounts and contributed exactly half towards all expenses, including utilities and groceries. The phone bill was also divided equally and each party expected to pay for their own long-distance calls. Throughout the hearing both parties consistently made references to ``my money'' and ``my account'' when testifying about their various contributions towards expenditures and acquisitions. Contributions toward the purchase price and settlement costs of the marital home and rental properties were also essentially split equally between the parties. Although Wife did contribute the greater percentage towards the downpayment on the marital home, it

was undisputed that Husband's greater contribution towards the downpayment and settlement of the first rental property, 25 Spruance Road, equalized the contribution made by the parties towards these two assets. Although Husband claims he made the greater contribution towards the purchase of 17 Spruance Road, according to the testimony of both parties, Wife paid $200.00 monthly for approxumately two one -half years in order to balance out the contributions made towards the purchase of that property.

Husband claims that he has made greater sacrifices throughout the marriage, justifying a greater percentage of the marital estate. He claims that for the first year of the marriage he was solely responsible for paying all of the family eexpenses. He further claims that he made great sacrifices in getting his wife to work and in teaching her english, thereby jeopardizing his work towards his Ph.D. Wife claims that she contributed from the very beginning of the marriage exactly half of all expenses and that it was because of Husband's drinking that his education suffered. Additionally, while Wife was always employed during the entire length marriage of the marriage, often with two jobs, she was also the party primarily responsible for the raising of the parties' two children.

I find Husband's contentions to have little to no merit. As discussed earlier, it was undisputed that the parties both contributed exactly half towards all expenses and acquisitions. I believe both parties made substantially equal contributions and sacrifices towards the marriage. Furthermore, Husband's requests for credits for contributions he made over the course of the marriage, such as money spent on a suitcase full of clothes he purchased during a visit to Ghana, are frivolous and unfounded. For approximately fifteen years, Husband and Wife managed their separate earnings and agreed to their specific financial arrangement. For Husband to now request this Court to go back and reconcile every discrepancy or inequity during those fifteen years is beyond the scope of these proceedings and a waste of judicial resources.

6. The Economic Circumstances of Each Party at the Time the Division of Property is to Become Effective. Both parties are in stable economic circumstances at this time. Both parties are employed, earning moderate incomes. Additionally, both parties will receive substantial assets by virtue of this decision and will be able to continue to receive additional income from their various rental properties.

7. The Debts of the Parties. The only marital debts of the parties are the

mortgages on the marital home and associated rental properties.

8. Tax Consequences. The parties will incur capital gains taxes upon the sale of any of the real properties. Although I recognize the impact that capital gains taxes have on the real properties of the parties, because neither party indicated their inclination to sell any of the properties in the near future and because of the speculative nature of the actual amount of those taxes, in exercising my discretion, I decline to reduce the value already assigned to the real properties earlier in this decision by the capital tax amounts. I do, however, recognize capital gains taxes are applicable in this case and have been considered in rendering this decision.

Husband is requesting a 57%-43% division of the marital estate in his favor. Wife is requesting a 50%-50% division. Based upon the consideration of the testimony and the aforementioned factors, the Court believes it is fair and equitable to divide the marital assets 50%-50%. It is apparent that the financial arrangement of this marriage was that each party was expected by the other party to contribute exactly one-half towards the acquisition of assets and payment towards expenses. From the beginning of this marriage, the parties kept their earnings separate, maintaining and managing their individual accounts and only combining their funds

to manage their joint rental properties or to contribute equally toward family expenses. Based upon this unique arrangement that existed between the parties during their entire marriage and their comparable current economic situations, it would be inequitable now to divide the marital estate other than through a 50/50 division. Accordingly, the marital estate is divided as seth forth in the attached ``Exihibit A''.

Wife shall be awarded the marital residence and the rental properties located at 25 and 17 Spruance Road, Dover, Delaware. She will be completely responsible for the payment of all mortgages, debts and liabilities associated with those properties and will hold Husband harmless for the same. Husband shall be awarded the rental properties located at 13 and 15 Spruance Road and be completely responsible for the payment of all mortgages, debts and liabilities associated with those properties and will hold Wife harmless for the same.

Although individual bank accounts and pension plans are considered marital property, in this case, in light of the fact that each party managed their own separate accounts and finances for the duration of the marriage, it would be inequitable to now attempt to split the accounts and equalize the balances to the detriment of the more frugal party.

Therefore, each party shall maintain their individual bank accounts titled in their names. No credit shall be given to either party to equalize the account balances. Each party shall retain the motor vehicles currently in their possession and be responsible for any debts or liabilities associated therewith. Each party shall retain 100% of their own pension and deferred compensation plans. Any household furnishings and personalty shall be divided pursuant to the ``two-list'' method. Wife shall prepare and present the two lists to Husband within thirty (30) days from the date of this order.

ATTORNEY'S FEES AND COSTS

Wife has requested an award of $2,500.00 towards payment of attorney's fees. In light of the overall decision, the Court is exercising its discretion in not awarding attorney's fees and costs. Wife's request is denied.

IT IS SO ORDERED this 6th day of June, A.D. 1997.

/s/.....
WILLIAM N. NICHOLAS, JUDGE

Date Mailed: 6/6/97

EXHIBIT A

Assets	Value	Husband	Wife
Marital Home	$59,776	$0	$59,776
25 Spruance	$19,800	$0	$19,800
13 Spruance	$18,524	$18,524	$0
15 Spruance	$24,553	$24,553	$0
17 Spruance	$15,550	$0	$15,550
Total Assets	$138,203	$43,077	$95,126
Net Assets	$138,203	$43,077	$95,126
Cash Equalize		$26,024.50	($26,024)*

* To be paid by Wife two (2) months after sale of Hancock property and division of proceeds.

IN THE SUPEME COURT OF THE STATE OF DELAWARE

FRANCIS OSEI-AFRIYIE,	)	
PETITIONER Below,	)	No. 279, 1977
Appellant	)	
	)	Court Below:
V.	)	Family Court
	)	of the State
GRACE A. AMPOFOH,	)	Delaware in
RESPONDENT Below,	)	and for Kent
Appellee.	)	County
	)	File No.95-3472

Submitted: January 6, 1998
Decided: January 7, 1998

Before VEASEY, Chief Justice, WALSH and BERGER, Justices.

ORDER

This 7th day of January 1988, upon consideration of the briefs of the parties, it appears to the Court that this matter be affirmed on the basis of and for the reasons stated in the well-reason decision of the Family Court dated June 6, 1997.

NOW, THEREFORE, IT IS ORDERED that the judgement of the FAMILY Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

/s/.....
E.NORMAN VEASEY, C.J.

IN THE SUPEME COURT OF THE STATE OF DELAWARE

FRANCIS OSEI-AFRIYIE,	)
PETITIONER Below,	) No. 279, 1977
Appellant	)
	) Court Below:
V.	) Family Court
	) of the State
GRACE A. AMPOFOH,	) Delaware in
RESPONDENT Below,	) and for Kent
Appellee.	) County
	) File No.95-3472

Submitted: January 20, 1998
Decided: January 26, 1998

Before VEASEY, Chief Justice, WALSH and BERGER, Justices.

ORDER

This 26th day of January 1988, the Court having carefully considered appellant's Motion, pursuant to Supreme Court Rule 18, for Reargument of the Court's Order dated January 7, 1998, and it appearing that the motion should be denied,

NOW, THEREFORE, IT IS ORDERED that appellant's Motion for Reargument be, and the same hereby is,

DENIED.

BY THE COURT:

/s/.....
E.NORMAN VEASEY, C.J.

IN THE SUPEME COURT OF THE STATE OF DELAWARE

FRANCIS OSEI-AFRIYIE,	)	
PETITIONER Below,	)	No. 279, 1977
Appellant	)	
	)	Court Below:
V.	)	Family Court
	)	of the State
GRACE A. AMPOFOH,	)	Delaware in
RESPONDENT Below,	)	and for Kent
Appellee.	)	County
	)	File No.95-3472

APPELLANT'S MOTION FOR REARGUMENT

Appellant moves the Court, pursuant to Rule 18 of this Court for an order (1) vacating its affirmance of the trial court's decision and order entered on June 6, 1997, and (2) granting the motion. As grounds for this motion, appellant states:

(1) Some of the constitutional matters to be reargued resemble the considerations which were involved in Eberly v. Eberly, Del. Supr., 386 A.2d 1139. In Eberly, this Court stated:

``... it was clearly an abuse of discretion and a denial of husband's due process rights to allow an interim award to remain in effect for twenty -two months without any evidentiary hearing.''

In the instant case, the trial court stated in its order that to equalize the distribution of the marital real estate, appellee was to pay appellant two months after the sale of a non-marital property (A29) and the distribution of proceeds (A36). The court issued this order without giving appellant notice and opportunity to be heard on a non-marital property. Therefore, like Eberly, id., the Order gave appellee unlimited duration of time to pay appellant which was an abuse of discretion. Also, appellant clearly was entitled, as a matter of due process, to be notified and given an opportunity to be heard before the order on a non-marital property was issued. But that principle was egregiously violated by the court below contrary to the 5th and 14th Amendments to the U.S. Constitution.

(2) The above violations were repeated when the trial court denied appellant permission to call and examine his witnesses who were in Ghana regarding a property in Ghana. The main basis of the denial was appellee's rights under the Confrontation Clause of the 6th Amendment. Another reason was conformity to the Rules of Evidence. But there are exceptions to both. See D.R.E. 804(a)(5); Pointer v. Texas, 380 U.S. 400, at 407 (1965) and Ohio v. Roberts, 448 U.S. 56 (1980). In Pointer, the Court stated:

There are other analogous situations

which might not fall within the scope of the constitutional rule requiring confrontation of witnesses.

In Ohio, the Court construed the clause ``in two separate ways to restrict the range of admissible hearsay.''

First, is the rule of ``necessity,'' under which it must be demonstrated that the declarant is unavailable. Second, once a witness is shown to be unavailable..., the clause countenances only hearsay marked with such trustworthiness that `there is no material departure from the reason of the general rule.' '' That is, if the hearsay declarant is not present for cross-examination at trial, the ``statement is admissible only if it bears adequate `indicia of reliability.' ''

In the instant case, appellant contacted his witnesses in Ghana. The witnesses could not come to Delaware and were unavailable. They were beyond the supoena power of the trial court. The situation clearly falls under Pointer, or Ohio,id; and by denying appellant's request to call his witnesses, the trial court also denied him his right to a full and fair trial. See Blonder-Tongue v. University Foundation, 402 U.S. 313, at 333.

The affirmance of the Family Court's judgement by this Court was premised on ``...it appears to the Court that this matter should be affirmed on the basis of

and for reasons stated in the well-reasoned decision of the Family Court dated June 6, 1997.'', without considering the above constitutional violations and the total disregard of equal protection of the law by the trial court. For example, the court failed to inquire whether a marital asset fell within any of the four statutory exclusions under 13 Del.C. Sec. 1513(b) when a party wanted it excluded from division. But this Court has consistently followed the statutory requirement. See Frank G.W. v. Carol, M.V., Del. Supr., 457 A.2d 715, 720-23 (1983), Gregg v. Gregg, Del. Supr., 510 A.2d 474, 478 (1986) and E.E.C. v. E.J.C., Del. Supr., 457 A.2d 688, 693 (1983). In E.E.C., this Court stated that the trial court committed legal error for failing to comply with a provision of Sec. 1513 and follow the guidelines of R.T.G v. G.K.G., Del. Supr., 410 A.2d 155 (1979).

Also, under Delaware law, marital property is not divided on the basis of who controls and manages the asset. Halsey v. Charlotte, 419 A. 2d 962, 965, Del. Fam. Ct. (1980). But in this case, the trial court divided the marital estate based on management and control, contrary to the law.

Finally, the combination of constitutional violations and complete disregard of the law is so grossly violative of the principles of justice as

to call for reargument. This motion is made in good faith and not for delay.

BY:
/S/.....
Francis Osei-Afriyie
P.O. bOX 185, Dover, DE 19903-0185
Petitioner, Below
Appellant
Dated: 1/20/98

MR. OSEI-AFRIYIE: Have you ever lied?
MS. AMPOFOH: No.
MR. OSEI-AFRIYIE: You haven't.
MR. STREET: You want to ask her the question whether or not she ever told you that she had a daughter in Ghana?
MR. OSEI-AFRIYIE: Okay, sure.
MR. STREET: Why don't you ask her that question?
MR. OSEI-AFRIYIE: Have you ever told me that we have a daughter in Ghana?
MS. AMPOFOH: You have her name on your record with immigration that she is your daughter.
MR. OSEI-AFRIYIE: Have you ever told me that we have a daughter in Ghana? That was my question.
MS. AMPOFOH: Her name is on your record so that makes it yes.
MR. OSEI-AFRIYIE: Yes you have. Do you believe that we have a daughter in Ghana? Earlier you have told me that we have a daughter in Ghana.
MS. AMPOFOH: Excuse me are we going into a different issue now?
MR. OSEI-AFRIYIE: No we are going into different issue. You said you have told this Court that you told me that you have a daughter in Ghana.

MS. AMPOFOH: Well, I go, I have to go for that explaining. When we were.....
THE COURT: Just answer that question that he asked you. Do you believe yes or no that you have a daughter in Ghana. Mr. Osei-Afriyie, I have asked her to answer the question that you asked. Can you answer that question?
MS. AMPOFOH: No.
THE COURT: You do not believe that you have a daughter in Ghana?
MS. AMPOFOH: No.
THE COURT: But you have told me, previous question was have you told me that we have a daughter in Ghana. You said the answer was yes, right. And then the subsequent question posed by the Court do you believe you have a daughter in Ghana and you said no.
MS. AMPOFOH: He didn't want me to explain.
MR. OSEI-AFRIYIE: Okay, Your Honor, I can, the Court will just make its own determination.

.....

MR. STREET: So all of it was done by you?
MR. OSEI-AFRIYIE: All of it was done by me. And I okay there's another thing I have to say here. Sometimes I have to go to the Black neighborhood and get somebody like Smiley with me and I paid them cash. Okay (unable to hear words) in the account. I have spent a lot of money

out of pocket on this. I gave them $20.00, $20.00 that all cash.
MR. STREET: Well did you do most of this handyman work or did you pay somebody to do most of it?
MR. OSEI-AFRIYIE: I did most of the work. But let me tell you, I don't want to go to the roof. The roof, these are all flat roofs and the roofs cause a lot of trouble. They leak. Okay so for instance I would go to Dover, Dover Rental and rent a ladder and pay someone. I got some receipts okay $35.00 to go to the roof and put new roof coating. And those things I can't do. But I changing the windows. I don't know when, the springs break. I don't know how to fix them so I've got to hire somebody to do that. And some of them are paid out of pocket
MR. STREET: But most of the handyman work you did yourself?
MR. OSEI-AFRIYIE: I do most of the painting yes. Painting now I can even put up a wall.
MR. OSEI-AFRIYIE: Now lets talk about the rental properties. What do I do to help maintain and keep, do I do anything at all to maintain the rental properties?
MS. AMPOFOH: Yes.
MR. OSEI-AFRIYIE: What do I do?
MS. AMPOFOH: Well I indicated this morning you do painting when tenants move out. You do painting. And minor jobs like changing the sink faucets. I have seen you doing it too. And fence, I have seen

you do the fence on 13 and 15 Spruance Road. You do minor jobs like fixing doorknobs. You have tried yeah to do it and the windows you have done those kind of material jobs.
MR. OSEI-AFRIYIE: Did I have a car before you came to CANADA?
MS. AMPOFOH: No.
MR. OSEI-AFRIYIE: When you were on day shift did I have a car while while we used to live at (unable to hear word) University?
MS. AMPOFOH: Well you bought a car because you got tired of walking me down to the hill. So you bought a car but I really don't know what is that month you bought a car.
MR. OSEI-AFRIYIE: So I bought the car to use for the purpose of transporting you to work and pick you up.
MS. AMPOFOH: I wouldn't say a hundred percent. You bought it and used it for yourself to.
MR. OSEI-AFRIYIE: Did I ever take you to Hampton Court and pick you up?
MS. AMPOFOH: I said yes.

.....

THE COURT: Okay Osei-Afriyie. Thank you. Which bank account are you referring to?
MR. OSEI-AFRIYIE: There' one Wilmington Trust. I think I communicated with one very on that issue and I send you a copy.

THE COURT: Is that the Wilmington Trust Company certificate of deposit?
MR. OSEI-AFRIYIE: No the two account numbers, not certificate of deposit is out, two bank account numbers, I think...
THE COURT: 27045987
MR. OSEI-AFRIYIE: Very good.
THE COURT: 98752773.
MR. OSEI-AFRIYIE: Very good.
MR. STREET: Beg the Court's indulgence for a moment. This letter from Mr. Osei-Afriyie, I'm sorry dated when again?
THE COURT: The letter dated December 20, 1996.
MR. STREET: I have that thank you. I have in the correspondence file a letter from Ms. Vari dated January 9th to Mr. Osei-Afriyie.
MR. OSEI-AFRIYIE: Yeah.
MR. STREET: Answering or providing information in the first paragraph as to the account, I'll just use the last four numbers 2773.
MR. OSEI-AFRIYIE: Yeah.
THE COURT: Well is there documentation regarding 2773 so the question, I suppose, is there any documentation as to 5987 from Wilmington Trust identifying that that account was, in fact, opened post divorce?
MR. STREET: Other than Ms. Vari's letter no.
THE COURT: Well my only concern is that that account is not accounted for in the respondent's 52D...

THE COURT: You have any idea how long, its important to me if there is a bank account that information be forthcoming with regard to that account. You don't want to continue this case. What is your request?
MR. OSEI-AFRIYIE: My request is this that you can see that Okay. When Ms. Vari communicated to me in writing...
THE COURT: Do you have a copy of any response from her to your letter?
MR. OSEI-AFRIYIE: The last one?
THE COURT: Yes.
MR. OSEI-AFRIYIE: Oh she never responded.
MR. STREET: Your Honor, our...
THE COURT: If I may, Mr. Street, granting all of that your letter of December 22 basically informs her that you want the information with regard to 5987 and that if its not provided, you threatened to either seek the Court's assistance by having filed a motion or by subpoena and you didn't do either one of those.
MR. OSEI-AFRIYIE: That's true.
THE COURT: So what I'm asking you today or right now is what relief are you asking?
MR. OSEI-AFRIYIE: See I want to get out of this stuff so I don't keep the account(unable to hear words).
THE COURT: Do you belief that there is money in that account that is marital property subject to distribution?
MR.OSEI-AFRIYIE: I have no idea..

.....

MR. OSEI-AFRIYIE: Well, Your Honor, okay what I indicated here after I left the property there are some bills now coming for me and I want us to share the bills equally except the telephone bill and yeah. Okay the telephone bill here now is $230.00. And it says the last payment wasn't made, amount of the last bill was $207.71. And I have 2/19, on 2/19/97 I wrote a check for 207.00 for telephone and electric bill. So I paid this one for March and I paid for February. Also there is a letter bill here for $100.00 and something dollars...

THE COURT: Are these bills in your 52D filing?

MR. OSEI-AFRIYIE: Yeah I indicated yes that's what I was trying to look for. There is a statement to that effect.

THE COURT: We talking about bills in the marital home or rental?

MR. OSEI-AFRIYIE: Marital.

THE COURT: Marital.

MR. OSEI-AFRIYIE: Yes.

THE COURT: You have to point that out to me because I don't see any any list...

MR. OSEI-AFRIYIE: You don't see anything there. I think I may have mentioned something there.

MR. OSEI-AFRIYIE: Page 6.

THE COURT: 6.

MR. OSEI-AFRIYIE: Yeah.

THE COURT: But you havn't submitted these expenses?
MR. OSEI-AFRIYIE: No that's why I didn't it , I still have them in my pocket.
MR. STREET: Your Honor, if this may expedite, I will offer, if there expenses we're talking about are utility expenses and telephone...
MR. OSEI-AFRIYIE: ...But I have some more expenses to be coming to me like water and sewer and all that stuff. I haven't received them yet.
MR. STREET: Those expenses normally associate with homeownership. Since Mr. Osei-Afriyie departure about a month ago if there were bill balances due at that time or bills incurred...we will agree to pay one half of those bills and if he's already paid them to reimburse him or if not we will agree to be responsible for any of those.
THE COURT: Does that satisfy you?
MR. OSEI-AFRIYIE: Yes...

.....

MR. STREET: Let me ask you a few questions, ma'am, over the years when you sent money to your father was your intention to make a gift or did you have

some other intention? Was this a gift to your father?
MS. AMPOFOH: Okay sometimes my dad would write to me pleading for financial assistance and I would send money for the upkeep and a couple of times I will emphasize use some of the money with the building.

.....

THE COURT: Are you trying to demonstrate by this line of questioning that there were expenses other than the mortgage was on these rental properties?
MR. OSEI-AFRIYIE: I am trying to demonstrate that there was a net positive income coming to her. She testified this morning that there wasn't net income. It was net negative income. And I'am trying to demonstrate that there was positive net income which should be distributed.
THE COURT: Well the only amount that she testified that there was a loss was in the month of April.
MR. OSEI-AFRIYIE: For which property?
THE COURT: For all the four properties.
MR. OSEI-AFRIYIE: There shouldn't be.
THE COURT: Beg your pardon?
MR. OSEI-AFRIYIE: For all properties, no. No, Your Honor, she hasn't shown to this Court what expenses she incurred after paying the $418.36 for 25 Spruce Road property. By my calculation it is

positive. They should demonstrate that it is negative.

THE COURT: Her testimony on direct was to the effect that it was negative for that month in taking into account the mortgage payments only. And she at that point in her testimony have not (papers shuffling). The security deposit was apparently used so that would term the analysis in the negative to a positive cash flow concerning mortgage payments for April.

MR. OSEI-AFRIYIE: Your Honor,...

MR. STREET: Do you understand what he just ...

MR. OSEI-AFRIYIE: Oh yes yeah. If there would be a negative cash flow, it's going to be positive.

THE COURT: That's correct. That would mean that her testimony wold be that there was positive cash flow from April and May and June.

MR. OSEI-AFRIYIE: The question is by how much.

THE COURT: Well if you want to demonstrate by how much you, that's why I asked you the question because I'm looking at page 5 in your 52D filed. And you have other expenses exclusive of the mortgage plugged into that filing. Are you trying to demonstrate what these other expenses were?

MR. OSEI-AFRIYIE: NO. The other expenses are my expenses and I will show it to the Court. They are my expenses, out of

pocket expenses and I will demonstrate to the Court that I incurred those expenses and I should be reimbursed.

THE COURT: Would it be easier to show those to Mr. Street?

MR. OSEI-AFRIYIE: Yes I will go ahead and do that.

MR. STREET: Your Honor, before we do that a trying to prove his expenses through respondent's case backwards. And we didn't get into our expenses cause frankly he has not proven his in his case. But rather than stand on that, let me suggest there, based on his 52D filed the expenses he claims to be approximately $2,000.00, $2,100.00. We're gonna take it and, about his Court's time on a $2,000.00 issue. I would propose without conferring with my client and I hope she will agree with this, if we can pick a person, lets go on to other matters, agree on a person to act as an arbitrator. If you want to use Mr. Owens the realtor you selected I would agree with that, and will you submit your receipts to him. Your former wife can submit her receipts. You can see hers. She can see yours. We would both set a time to have a short discussion with Mr. Owens where you would explain why you think your receipts are valid. Mrs. Ampofoh would have the same opportunity and let Mr. Owens make that decision. And we wold agree to be bound by that

decision. Would you agree with that process?
MR. OSEI-AFRIYIE: You mean Mr. Robert Owens?
MR. STREET: Robert Owens the realtor you selected? Would that be acceptable to you?
MR. OSEI-AFRIYIE: But I have mine here.
MR. STREET: We don't have ours here.
MR. OSEI-AFRIYIE: Oh you don't have yours.
MR. STREET: And the Court has limited time.
MR. OSEI-AFRIYIE: Yes I will agree.
MR OSEI-AFRIYIE: O before then, Your Honor, what about Mr.Owens, because I have a lot of expenses here. Is there any , is there, are you going to give any time or is this beyond your scope now so, I don't want them to go back on their way and then get stuck with these bills.
THE COURT: You will find that if Mr. Street entered into an agreement with you that he will follow through with that agreement. If he does not follow through that agreement since its part of a stipulation that's part of this record you may apply to me but I think you will find you'll have a harder time getting a hold of Mr. Owens perhaps than you will Mr. Street.
MR. OSEI-AFRIYIE: Okay thank you very much.

P.O.Box 185
Dover, DE 19903-0185
April 30, 1996.

Honorable William N, Nicholas
Family Court of the State oF Delaware
Kent County
400 Court St.
Dover, DE 19901

Re: Osei-Afriyie v. Grace Ampofoh
File No. 95-3472
Petition No. 95-13580

Dear Judge Nicholas:

On MARCH 26, 1996, the parties agreed to have Mr. Robert Owens examine pages 5 through 9 of petitioner's Rule 52(d) submission, collect information relating to rental expenses and bills accrued on 153 Royal Grant Way before services were transferred to the respondent's name and draw his conclusion.

On March 31, the petitioner contacted Mr. Owens, told him about the above and asked if he would be willing to undertake that responsibility. He responded that he would and indicated that he would contact Mr. Street and find out what the Court wanted him to to do. He assured me that

he would call me to schedule a meeting after contacting Mr. Street.

On April 1, 1997, the Petitioner called Mr. Street and informed him that he (the petitioner) had spoken with Mr. Owens regarding the parties' agreement. The Petitioner also informed Mr. Street that Mr. Owens would be contacting him. Mr. Street told the Petitioner that since his involvement would be an additional expense to the Respondent, he would rather have Mr. Owens meet with the parties.

On April 3, at about 8:45a.m. the Petitioner called Mr. Owens and asked him if he had contacted Mr. Street. He responded that he had contacted Mr. Street's office and was told he (Mr. Street) was not available. He told the Petitioner that he had left a message for Mr. Street to return his call. At about 11.00a.m. on the same day the Respondent called the Petitioner's office and told the secretary that it was the Petitioner's daughter, Jennifer Osei-Afriyie, who was on the phone. When the Petitioner picked up the phone the Respondent identified herself as the caller. The Pespondent accused the Petitioner for stealing the envelope she kept her 1997 bills and cancelled checks. The Petitioner told the Respondent not to call his office and harass him and hung up the phone.

At about 1:30 p.m. that afternoon, the Respondent came to the Petitioner's office and gave him a Section 8 check for April 1997, a note, copies of some receipts and a copy of a cancelled check. Copies of the note, receipts and the cancelled checks are enclosed. If the envelope in which she kept her 1997 bills and cancelled checks is missing, where did 1/7/97 (Exhibit A), 1/23/97 post office receipt(Exhibit B1), 2/21/97 cancelled check (Exhibit B2), and 3/21/97 (Exhibit B3) receipt come from?

The Petitioner contacted Mr. Owens again on April 8 and 10, 1997. On April 10, Mr. Owens informed the Petitioner that he spoke with Mr. Street's secretary on 4/9/97 and was told that Mr. Street would be contacting him to set up a meeting.

The Petitioner called Mr. Street's office on April 11, 14 and 15 and left messages for him to return his call. In fact, on April 15, 1997, the Petitioner informed the secretary that if Mr. Street failed to return his call he would write to the Court about the agreement the parties reached in the courtroom. Later that day someone called the Petitioner from Mr. Street's office and told the Petitioner that that office had contacted Mr. Owens. The following day, April 16, 1997, the Petitioner received a copy of a correspondence from Mr. Street's office to this Court in the mail. The envelope

and the copy of the letter are enclosed as Exhibits C1 and C2. It is obvious that a copy was sent to the Petitioner after the Petitioner had threatened that he would write to the court.

On April 22, the Petitioner called Mr. Owens to find out if Mr. Street had contacted him. He informed the Petitioner that he had spoken with Mr. Street and he had to find a conference room and set a date where we could meet. I offered the conference room in my office for the meeting. He then told me that he would contact the Respondent and inform me about the for the meeting.

On April 25, the Petitioner called Mr. Owens to check if a meeting date had been set. He informed the Petitioner that nobody answers the phone when hec calls the Respondent's house and he would go there that afternoon. He would call me when he came back to his office. I did not hear from him.

On April 28, I contacted Mr. Owens again. He told me that would go to the Respondent's house that morning and would call me about the date for the meeting when he returned to his office. I did not hear from him.

This morning, April 30, 1997, the Petitioner called Mr. Owens to find out if he had contacted the Respondent. He informed me that Monday May 5, 1997 had been set for a meeting at Mr. Street's conference room at 2:30p.m. Although I

have to finish a review committee draft report on an application submitted by Cataract and Laser Surgery, LLC. and have it mailed that day, I agreed to meet with him and the Respondent. This is because I want to get the bills accumulated at 153 Royal Grant Way paid, half of my rental expenses refunded and half of the rental incomes also refunded. (see Exhibits D1, D2, and D3 for bills).

I also want this Court to know that I had paid all my bills up to February 28, 1997. In fact, on February 28, 1997, before a Family Court Commissioner issued an ex-parte order that I should not go to the family residence, I had written a check for $658.97 (Exhibit E)to cover PNC March mortgage of $421.43 and the balance of $237.55 was to be applied towards other utilities including cable, telephone and electricity. The Resopndent may noy not have paid the cable bill for two months (monthly bill was about $33.33). She may not have used the $237.55 to pay any of the other bills. My credit is in jeopardy because the bills came in my name.

What also concerns me at this time is that Mr. Owens told me this morning that he understands the issue in dispute is about incomes and expenses for a period of two(2) years. This is undoubtedly a tactical delay. I told him that was incorrect and the issue in contained in my Rule 52(d) submission, pages 5 through

the first part of page 9. The submission requests relief up to March 1997. What about the incomes and expenses after March 1997? Because the parties do not know the date the family Court will set for the parties to execute any documents necessary to implement the Court's Order for the property division, they are going to continue to receive disproportionate net incomes from the rental properties. When will that be looked into for distribution? Petitioner believes that Mr. Owens can only draw a partial conclusion up to March 1997. Assuming his examination is extended by the Court to include April and part of May, what happens to the incomes and expenses after May 5, 1997? This is an important question that concerns the Petitioner. Consequently, the Petitioner suggests the following:

1. Because there was no dispute in income in Court and the Court knows what the issue is, the Court shall ask the parties to exchange information on monthly expenses with copies sent to the Court. This shall be done with the date of the Court's Order in mind.
2. If the parties agree on the expenses, the Court shall draw its own conclusions and incorporate it in its order.
3. The Court shall also ask the parties to prove the utility bills paid and the balance shared. This shall be incorporated in the Court's Order.

In the alternative,

1. The Court shall have a conference call with the parties including Mr. Owens and let him know the information he is supposed to collect.
2. The Court shall set a date for Mr. Owens to submit the information collected including his conclusions. Mr. Owens shall send copies to the parties.
3. The Court shall give the parties three days to raise any objections to Mr. Owens' conclusions.
4. In the absence of any objections, the Court shall incorporate Mr. Owens' conclusions in its Order. If there are objections, the Court shall examine the reasons for the and draw conclusions.

Yours truly,

/s/ .....
Francis Osei-Afriyie
(Petitioner)

cc:
Mr. Robert Owens
Mr. Gerald I. Street

.....

MR. STREET: And she withdrew $4,800.00?
MR. OSEI-AFRIYIE: Yes.
MR. STREET: And isn't it true that what she left in that account was the same amount $4,800.00?
MR. OSEI-AFRIYIE: I don't recall because what I was doing you see I can go back

and show you that after she had withdrawn her money, took all her money from that account I was writing checks to pay bills on the rental properties.
MR. STREET: And you were using the money that she left in that account?
MR. OSEI-AFRIYIE: Yes. While she had already withdrawn more than half of it.
MR. STREET: She took half and left you half?
MR. OSEI-AFRIYIE: What I am saying is...
MR. STREET: Answer my question and then you can explain it, isn't that what happened?
MR. OSEI-AFRIYIE: No she left half. And I can show you that the date she withdrew the money from the account and subsequently the checks I wrote went towards the rental properties.
MR. STREET: Subsequent to when she withdrew that money?
MR. OSEI-ARFIYIE: Yes. I was spending the money on the rental properties.
MR. STREET: Lets try again, subsequent means afterwards.
MR.OSEI-AFRIYIE: Yes I know that, I know that.
MR. STREET: I'm asking at the moment she took the $4,800.00 there was left in that account $4,800.00, isn't that correct?
MR.OSEI-AFRIYIE: That's not correct.
MR. STREET: That was, that account we just been talking about was an account with PNC?
MR. OSEI-AFRIYIE: Yes PNC.

MR. STREET: $4,800.00.

.....

MR. STREET: Let me now talk a bit about the Ghana property. In Mrs. Ampofoh's Rule 52D document she filed she makes some claims and I want to see if you agree.
MR. OSEI-AFRIYIE: Okay.
MR. STREET: She claims that she took about $3,000.000 from her own individual accounts and used that to pay various workers to finish the house. Is that your understanding too?
MR. OSEI-AFRIYIE: No.
MR. STREET: Okay what's your understanding?
MR. OSEI--AFRIYIE: About that house in Ghana?
MR. STREET: Uh huh.
MR.OSEI-AFRIYIE: Oh I knew that when we were in Canada while I was paying all the bills, in the hills (unable to hear words), she was sending money to take care of first she said we have a daughter in Ghana so the money was going to the daughter. And that was paying the bills but I didn't have a daughter in Ghana. Then when we came to Philadelphia, she was doing the same thing. Sending money. I didn't know that she was building a house. Okay then sometime before I went to Ghana I, she mentioned to me that she and her brother were building a house.

Now she says the house belongs to her father. So there are a lot of stories around that house. Okay and I don't , her father doesn't even live there. Her brother doesn't live in the house. He is in the village. So I don't know who, she is trying that she doesn't want the property but she told me that she owned the property.

MR. STREET: You and your wife went back to visit your village in Ghana in 1993 didn't you?

MR. OSEI-AFRIYIE: Yes.

MR. STREET: And isn't it at that point in time that she paid a substantial amount to father around $3,000.000 to her father or some workmen?

MR. OSEI-AFRIYIE: She had paid that money long time before that. She had paid the $3,000.00 to roof the building, for the roof.

MR. STREET: So when she was there in '93 she didn't pay any money?

MR. OSEI-AFRIYIE: She paid some money.

MR. STREET: Oh she paid money then?

R. OSEI-AFRIYIE: Yeah. But I don't know how much. You see, $3,000.00 I don't know how much.

MR. STREET: But you were aware that she was doing this?

MR. OSEI-AFRIYIE: I was aware yes. I know what she did what the roofer, the guy who roofed it. She told me to double sheet.

MR. STREET: You helped her negotiate the price for the roofer?

MR.OSEI-AFRIYIE: Yes because she was completing the house was what she told me. And my friend in Ghana also negotiated with the bricklayer or mason to complete the property.
MR. STREET: You have no objection to what she was doing at that time?
MR. OSEI-AFRIYIE: Well you see the letter I produced. She mentioned Jennifer in that letter, Jennifer her daughter here. That's what she says in that letter.
MR. STREET: So as long as that is a place for her daughter to own for at some point in Jennifer's life then that's fine by you?
MR. OSEI-AFRIYIE: She said as long, okay she says that is her house. Okay she was building a house.
MR. STREET: Sir, what's your objection to it?
MR. OSEI-AFRIYIE: I don't have any objection to her building the house, she cannot at the same time tell me that the house doesn't belong to her. That's what she's been trying to say. In all your communications to me at one point in time Ms. Vari say that she will change her mind, she will change her mind depending upon...
MR. STREET: Objection to any statements...
THE COURT: You cannot refer to matters that were in negotiation.
MR. OSEI-AFRIYIE: Your Honor, we were not negotiating as such. She was inclined

that, she left it blank. And led on to say it belongs to the father, they tell me specific. They don't know who the house belongs to. As I said when she comes she will know who the house belongs to.

MR. STREET: My question to you sir, is you did not object at the time she was sending money to her father, did you?

MR. OSE-AFRIYIE: Well...

MR. STREET: Did you object, sir, did you say don't do that that , stop that?

MR. OSEI-AFRIYIE: Well because, she said that we had another daughter there so the money was going to take care of our daughter too.

MR. STREET: Then you told us you discovered there wasn't another daughter.

MR. OSEI-AFRIYIE: I discovered that it wasn't mine.

MR. STREET: And she kept sending money.

MR. OSEI-AFRIYIE: That I didn't know about that.

MR. STREET: You didn't know that she was paying to the roofer, you negotiated with?

MR. OSEI-AFRIYIE: No you said she kept sending money, that I didn't know. I was in Ghana when she said I should negotiate with the roofer.

MR. STREET: And you were aware that she was gonna the roofer the money?

MR.OSEI-AFRIYIE: Of course, yes I was.

MR. STREET: And did you object to that? Did you say no don't do that I don't like this?
MR. OSEI-AFRIYIE: You don't know the relationship. If I open my mouth that would be a different story. I said (unable to hear words) when she was negotiating with the guy, the bricklayer I was there. She told the bricklayer that was none of my business okay.
MR. STREET: Did you object yes or no? Yes or no?
MR. OSEI-AFRIYIE: When I, okay what I'm trying to tell you is she knew I objected to it but there was not much I could do.
MR. STREET: Somehow she knew this?
MR. OSEI-AFRIYIE: Somehow she knew.
MR. STREET: Didn't that money come from her individual accounts just like you had individual accounts from your savings and your paycheck?
MR. OSEI-AFRIYIE: That was from a joint marital, it was from rental property.

.....

THE COURT: The 52D petitioner filed indicated that the testimony would be with regard to ownership and the value of the property. Is that what you are offering his testimony?
MR. OSEI-AFRIYIE: Yes, your Honor, he's going to indicate his conversation with Grace about the ownership of that

property... The Court allows people to testify by phone. And I don't see no reason why this cannot be done especially (unable to hear) in bringing somebody all the way from Africa.

THE COURT: Well what would be nature of this testimony be?

MR. OSEI-AFRIYIE: I, the person is going to testify to the fact there was a conversation between him and Grace about the ownership of the property. He should provide the completion of the house. Grace gave him money to pay the bricklayer who was completing the property and when it was finished he went and inspected it and paid the guy. And the job was to his satisfaction. But he is going to testify about the rental property.

THE COURT: Which of the two witnesses you suggest in your 52D would be offering this testimony?

MR. OSEI-AFRIYIE: Dr. (unable to hear name) will do that. He was, and this guy who built, who build it. And he has knowledge that the property belongs to Grace. Dr. (unable to hear name) was the one who supervised. And paid the guy. He was the guy, the money was funded over and...

THE COURT: He's qualified to testify that its worth $40,000?

MR. OSEI-AFRIYIE: Yes...

.....

MR. STREET: Mrs. Ampofoh, you were formerly married to Mr. Osei-Afriyie, were you not?
MS. AMPOFOH: Yeah.
MR. STREET: ... You admit do you not, and I'll do a bit of leading, Your Honor, you admit, do you not, that during a period of your marriage you would send money to your father back home in Ghana?
MS. AMPOFOH: Yes.
MR. STREET: And where did that money come from?
MS. AMPOFOH: My own savings.
MR. STREET: Your own bank account?
MS. AMPOFOH: Yes bank account.
MR. STREET: And did you, when if, if anything , did you and your father ever talk about as far as using being the owner or him being the owner? Who is the owner of this property as far as you know?
MS. AMPOFOH: Well I will go back when I was in Canada. My father wrote to me that's a, our family I'm the first child. We have seven my mother's children. But we don't have anywhere to live because they live in the family home. And I discussed this with Francis that my father wants me to help with the household, the family including my siblings and my parents. Francis told me he had nothing to do with my family issue. And he testified. I had a brother in Linden whom I contacted beginning to

this house we are addressing. So my brother and me we started sending home money to my dad and my dad acquired the land...
THE COURT: Do you have questions?
MR. OSEI-AFRIYIE: Yes. You have a house in Ghana or you have a building in Ghana?
MS. AMPOFOH: I don't.
MR.OSEI-AFRIYIE: Your Honor, can I approach and get the letter?
THE COURT: Want to give that to the bailiff.
MS. AMPOFOH: Okay this is a letter I had written to...
MS.OSEI-AFRIYIE: I don't want to go. I indicated a statement that what you have to read.
MS. AMPOFOH: Okay he wants me to read the paragraph here. Pardon me I have been strongly advised by Osei, that's Francis, to contact you for assisting me to complete my house (unable to here word).
MR. OSEI-AFRIYIE: That's all I want. Which house were you talking about?
MS. AMPOFOH: This house don't have anything to do with my father...
MR. OSEI-AFRIYIE: That is not my question. My question is you have read something into evidence. And you did mention that or you got a letter I am asking for your assistance to complete my house in (unable to hear word). Which house are talking about?
MS. AMPOFOH: I don't which house.

MR. OSEI-AFRIYIE: Your Honor, I think that credibility here should be taken into account. And the Court has the letter and the respondent read her...
MR. STREET: Your Honor, we are into argument at this point and I do object to her.

THE COURT: Well what's, let me ask a couple of questions.
MS. OSEI-AFRIYIE: Sure, Your Honor.
THE COURT: When do you, when do you claim that your father acquired the land, when?
MS. AMPOFOH: When. This should be it be around 1983 because its after 1981. So it might be around 1983.
THE COURT: Were the two of you already married when the land was acquired?
MS. AMPOFOH: Yes.
THE COURT: When did you start contributing financially toward the construction of the house?
MS. AMPOFOH: It was not continuous. When I was in Canada...
THE COURT: Between 1983 and 1993 how much money did you contribute toward the construction of the house?
MS. AMPOFOH: It should be more that $5,000.00
THE COURT: Any follow up questions?
MR. STREET: Clarification. When the judge just asked you between 1983 and 1993 how much did you contribute toward the house and you said not more than $5,000.00.
MS. AMPOFOH: Yes.

MR.STREET: Let me be clearer. You have also said, many times you sent money not for the house , for welfare.
MS. AMPOFOH: Yes.
MR. STREET: Are you including the money for the welfare in that $5,000.00?
MS. AMPOFOH: No just for the house...

.....

THE COURT: When we concluded yesterday the parties had presented evidence with regard to whether or not a piece of real estate in Ghana constituted marital property as belonging to the wife. I heard the testimony of Ms. Ampofoh that her father acquired the real estate in 1983 and that her father wanted her and her brother to help build a house on that real estate for the family. And as a result of that request she and her brother periodically sent money home for the purpose of constructing a house on the real estate. And that the house was for her siblings and her parents. Mr. Osei-Afriyie presented testimony or rather evidence which is petitioner's exhibit 17 which is a letter dated June 11, 1993 written by the respondent to an individual in Ghana requesting his assistance in the construction project.And in that letter, she wrote I've been strongly advised by my husband to contact you for assisting me to complete my house. You have to help my

mother to have a place to stay. I shall be sending you money if you offer this important help in my life. My two daughters want to visit. You and I know I don't have a room for even the night. She goes on to say and I'm reading this out of context my father started the house but couldn't complete probably due to physical weakness. Contact him and mother for where the house and the land are and we can start from there. The petitioner argues that by virtue of her referring it to my house and her needing a place to stay and not having room for even one night that I should conclude that she has an ownership interest in the property and it should be included in this marital estate for purposes of distribution. Neither of the parties have offered any conclusive evidence as to real estate law in the country of Ghana. It is unrebutted on this record, however, that the respondent's father acquired the land. That she and her brother had contributed funds to build a house on it. While she did refer to the house as my house in that letter she also testified that the house was for her and her siblings. And the letter indicated that her mother needs a place to stay. I believe that the record is ambiguous at best and I cannot conclude from this record that the respondent has an ownership interest in the land sufficient for me to conclude it as marital property. She did, however,

testify that she contributed $5,000.00 from what amount to marital funds toward the construction of the house as gitfs to her family. And I will take into account the $5,000.00 contribution from this marital estate. Consequently, I've ruled that the propery in Ghana will not be considered as marital property and there is no need for the Court to take any testimony from anyone in Ghana with regard to its valuation. I also want to say that the petitioner made some comments yesterday about the Court taking testimony by telephone, and I want to make the record clear in that regard. My practice has been on occasion in emergency proceedings to take telephone testimony from experts where neither of the parties objects to the testimony being taken by telephone. Its a practice that I think should be discouraged and should only be used in exigent circumstances and only where both parties waive their constitutional rights to confrontation. I have never permitted telephonic testimony over an objection of any party with regard to their confrontation rights. And I take particular note that in this case such testimony is fraught with peril because of the reasons that Mr. Street stated on the record yesterday. In any event, the point is made. I will take into consideration cash contribution but will

not take into consideration the value of the property.
MR. OSEI-AFRIYIE: Your Honor.
THE COURT: Yes.
MR.OSEI-AFRIYIE: I please object to that...
THE COURT: Well I've ruled that I'm going to take into consideration at least the value of the $5,000.00 that she testified to. If you can demonstrate that she made contributions in excess of that $5,000.00 I will consider that in my ultimate distribution of the marital estate.
MS. OSEI-AFRIYIE: And in addition to the interest the money would have earned.
THE COURT: Well you can make that argument and I'll take it under consideration.
MR. OSEI-AFRIYIE: I know she will deny it but in 1990 she went to Ghana and when she went there she contributed $3,000.00 to put the roof on the part of the house which I think complete it. And that should be taken into account.
THE COURT: Well if you can demonstrate that before the close of the evidence in this case, you know, as I've said the only testimony that I've heard so far is that she sent $5,000.00 toward construction of the house. She did testify that she made other periodic contributions but I've heard no evidence as to what amounts of those contributions were. At least at this point.

MR. OSEI-AFRIYIE: Okay since she testified that she made some contributions and we do not have any bank statement nothing like that to prove at least when I was going to Ghana in 1985 first to pick up to tell that she went to Ghana and to bring her back to the U.S. she gave me at least $3,000.00 to give to the parents, that we had a daughter there and that should be taken into account toward the building too.

THE COURT: Well you've not closed your portion of the case. When we concluded yesterday you had indicated that you wanted to take the telephonic testimony. Its still your case. If you wish to resume the witness stand to offer more testimony regarding contributions that she sent to Ghana you're free to do that. Would you like to do that?

MR. OSEI-AFRIYIE: Yes.

THE COURT: Alright please resume the witness stand. And you are still under oath.

MR.OSEI-AFRIYIE: In February 1985 I took Jennifer and Monica at that time six months old and two and a half years to Ghana. When I was leaving without about three suitcases, two suitcase full of food belonging to Jennifer and Monica, one full of clothes... When I was leaving to go and bring them back to the U.S.., she gave me $3,000.00 to give to the parents towards the building. In 1990, Grace went to Ghana to visit her parents.

She gave the father $3,000.00 to put the roof on the completed portion of the building. And at the moment, her father and father are divorced because of that property. The mother lives in the village outside Henie. Her brother whose name is Peter sold the(unable to hear words). The remaining portion of, she bought a lot of(unable to hear words). And then when they finished roofing the whole house there was still some remaining. Peter took the corrugated(unable to hear word) and sold them and the father was mad. And the sons response that this belongs to my sister. Ever since that time there's been a problem because Peter wants to control the house belonging to her sister and the father doesn't want that. And the mother is on the side of the son. Because the house doesn't belong to the father. The house doesn't belong to the mother. It belongs to her and the son is trying to control it. There was an argument and the father went and got married again and went to the village. So he didn't have anything to do with it.

MR. OSEI-AFRIYIE: And in addition in when we go in Philadelphia (unable to hear word) a guy who lives in New York when he was going to Ghana she gave $500.00 to him to be given to the father towards the house.

.....

MR. STREET: When did you find out this girl was not your daughter?
MR OSEI-AFRIYIE: Oh late in some time in, after 1990.
MR. STREET: After 1990.
MR. OSEI-AFRIYIE: Yeah.
MR. STREET: Sometime by 1991.
MR. OSEI-AFRIYIE: To be exact it was around 1992. When I went to my father's funeral. When I realized that, that was not my daughter.
MR. STREET: At that point in time so that 1992's you discovered this daughter is not your daughter?
MR. OSEI-AFRIYIE: Yes.
MR. STREET: Okay. And the suitcase of clothes, did you bring any receipts of how much was spent on these clothes?
MR.OSEI-AFRIYIE: Did I bring them here today?
MR. STREET: Yeah. You may not, sir. I'm just asking.
MR. OSEI-AFRIYIE: I think you have to be (unable to hear word). You're talking about 1985 when you went to a store and bought clothes. You expect me to have receipts for 1985.
MR. STREET: Well let me ask you this whatever amount that might be do you want interest on that also?
MR. OSEI-AFRIYIE: Yes. Because I was cheated.
MR. STREET: And how much, do you want half or more than half?

MR. OSEI-AFRIYIE: Oh half because we contributed. We went shopping together and we have the savings together so we just bought everything. But the other two suitcases belong to Jennifer and Monica so there shouldn't be a problem with that.
MR. STREET: Let me see I understand this. Before you left for Ghanain February of '85 your then wife gave you $3,000.00 in cash to give to her parents.
MR. OSEI-AFRIYIE: Yes.
MR. STREET: To help with the house?
MR. OSEI-AFRIYIE: Yes.
MR. STREET: And you, you knew this was cash. I assume you saw it?
MR. OSEI-AFRIYIE: Oh yes.
MR. STREET: And you knew the purpose?
MR. OSEI-AFRIYIE: I knew the purpose.
MR. STREET: And you gave it to the parents?
MR. OSEI-AFRIYIE: I did. And that was part of our marital money because I was, wherever you used to live at the University I was paying the bills.
MR. STREET: And in another, you talked about another incident involving $3,000.00 I thought in 1990?
MR. OSEI-AFRIYIE: She, she came back and told me yes for the roof.
MR. STREET: And the $3,000.00 that's something she took to Ghana?
MR. OSEI-AFRIYIE: That's what she told me.
MR. STREET: Not in 1993?

MR. OSEI-AFRIYIE: Not in 1993. 1990. You see the house was built in two phases. Phase one that is where we went and slept. We slept in one of the rooms. The roof and everything was complete.
MR. STREET: And the $3,000.00 in 1990 is that in addition to the $3,000.00 in 1993?
MR. OSEI-AFRIYIE: She just testified about 1993. You see the one in 1990 was for the first part of the building. But the later part is what she talked about in 1993.
MR. STREET: So we are talking about three different episodes of $3,000.00?
MR. OSEI-AFRIYIE: Yes.
MR. STREET: May be I should ask this did the money come from a bank account with both names on it or a bank account with just her name on it?
MR. OSEI-AFRIYIE: Came from a bank account with her name on it.
MR. STREET: Her individual name?
MR. OSEI-AFRIYIE: But the point is this whatever money is in that account comes from wages from her wages.

.....

MR. STREET: And what were the arrangements between you and your husband as far as who would contribute what towards the expenses? How much were you to pay, half, more that half or what?
MS. AMPOFOH: Well when I first came in they were taking the rent I think from

the teaching assistant check. But sooner or later, I didn't stay there long. We moved and started renting apartment so I started contributing positively out of my paycheck.

MR. STREET: This suitcase of clothing at any time since 1992 did Mr. Osei-Afriyie tell you that he disagrees with that, he should be paid one half of the value of those suitcase and clothes?

MS. AMPOFOH: No.

MR. STREET: And the $3,000.00 that he apparently himself transported in February of 1985 this he talked about did he at any point at the time or sense object to you sending that money to your family?

MS. AMPOFOH: No.

MR. STREET: And the money in 1990, lets talk a little bit about that. This is where he has said that you essentially contributed another $3,000.00, I think he said either to the house or to the roof of that house in Ghana. I don't recall which. Did you in fact, go to Ghana in 1990 youself?

MS. AMPOFOH: Yes.

MR. STREET: And was he with you?

MS. AMPOFOH: No.

MR. STREET: Okay and did you, in fact, give any money to your family in 1990?

MS. AMPOFOH: Yes.

MR. STREET: And about how much?

MS. AMPOFOH: About a thousand for the (unable to hear word).

MR. STREET: Throughout your employment in Delaware have you maintained separate bank accounts from your husband?
MS. AMPOFOH: Yes.

.....

MR. OSEI-AFRIYIE: Your Honor, I was looking for a certain check and I will get it later on and look for it. This morning we heard that since we got married from Canada all the way to the United States here until we bought rental properties we each had or separate accounts. It that what you told the Court this morning?
MS. AMPOFOH: Yes.
MR. OSEI-AFRIYIE: When did we buy the first rental property? Your Honor, remind her to go faster. The first rental property was at 25 Spruce Road. Is that correct?
MS. AMPOFOH: Yes.
MR. OSEI-AFRIYIE: Is it correct to say that we bought that in on the the 31st of May 1991?
MS. AMPOFOH: I know its 1991.
MR. OSEI-AFRIYIE: '91. So through 1991 we didn't have any joint account?
MS. AMPOFOH: I don't remember.
MR. OSEI-AFRIYIE: Can the Court make copies and give me the original back?
THE COURT: We are not going to make copies right now. Do you want to ask her questions about these checks?

MR. OSEI-AFRIYIE: You seen these, Grace, haven't you?
MS. AMPOFOH: Yeah.
MR. OSEI-AFRIYIE:Did we have a joint account prior to the purchase of 25 Spruce Road in 1991?
MS. AMPOFOH: Well this check proves that.
MR. OSEI-AFRIYIE: So it correct to say that we had joint account in 1988?
MS. AMPOFOH: There is something there.
MR. OSEI-AFRIYIE: Is that correct that we had joint account in 1989?
MS. AMPOFOH: Well it indicates that on the check.
THE COURT: You want to introduce that into evidence?
MR. OSEI-AFRIYIE: Yes please.
THE COURT: Or do you want to offer substituted copies into evidence? You want to keep the originals?
MR. OSEI-AFRIYIE: I want to keep the originals.
THE COURT: You have any objection to the substituted copies, Mr. Street?
MR. STREET: No your Honor, subject to I'd like to a little voir dire of the witness if I could before.
MR. STREET: Alright. May I have those checks for a minute, sir. May I approach the witness, You Honor.
THE COURT: Yes you may.
MR. STREET: Mrs. Ampofoh, I show you four checks drawn on Mellon Bank that have two names, you and your husband? You see what I'm talking about?

MS. AMPOFOH: Yes.
MR. STREET: Okay. Did you know about that bank account? Is that an account you opened or used?
MS. AMPOFOH: Well it lists us both.
MR. STREET: Well that's not my question because either one can open an account and put both accounts on it. Did you open that account to your knowledge?
MS. AMPOFOH: I don't remember.
MR. STREET: Those signatures on those four checks, any of those your name?
MS. AMPOFOH: This is mine. This is mine.
MR. STREET: Okay now I w'd like to show you, beg the Court's indulgence for a moment. I'm trying to find the account number. I do not, here is the second drawn on the Bank of Delaware with both names on the top. Do you recall opening that account or being a part of that account? Your names on it but did you
MS. AMPOFOH: Yeah Bank of Delaware is at PNC.
MR. STREET: That's not my question, ma'am. Did you open that account?
MS. AMPOFOH: I know PNC there are two of them.
MR. STREET: No did you open it? Did you go to the bank and create that account atart it and...
MS. AMPOFOH: Oh no.
MR. STREET: Okay so didn't open this account. Did you open this account?
MS. AMPOFOH: No.

MR. STREET: Did you go to the bank and say I'd like to start this joint account?
MS. AMPOFOH: No.
MR. STREET: No further questions, no objections to the document coming in.
MR. OSEI-AFRIYIE: Okay did you and I go and open the account?
MS. AMPOFOH: I really don't remember and I don't remember when we opened Mellon. PNC I know we had a joint account.
MR. OSEI-AFRIYIE: Do you have, Your Honor, this is going to be the question of credibility and the Court probably will allow me this. What I will have to do then is I have , I have to be given permission to go to the bank and get a signature card. Not now but if cause I didn't know she was gonna deny that, the previous account. You cannot write a check and cash it without a bank going to check for the signature card to find out what, your name is on the. So...
MR. STREET: Your Honor , I'm prepared to stipulate that there is probably a signature card with her name on it.
THE COURT: Want to ask that question whether or not she signed a signature card. You might make things a lot easier.
MR. OSEI-AFRIYIE: Yes. Do you have a name on a signature card?
MS. AMPOFOH: I said if we did open joint account probably is the two or first day. I didn't go alone to open a account, joint account.

MR. OSEI-AFRIYIE: Okay so what you told the Court was that you did not open it. Are changing your testimony that the two of us went and opened the account?
MS. AMPOFOH: That's what I'm saying.

.....

MR.OSEI-AFRIYIE: You indicated you have written the correspondence to the Court indicating that you wanted (unable to hear words) because you put $9,000.00 of the down payment on our property and you wanted to be (unable to hear words) and for our children. Would you then agree that I should be given 25 Spruce Road because I put down the portion of the downpayment?
MS. AMPOFOH: I don't have an answer. I don't agree.
THE COURT: I didn't hear your answer.
MS. AMPOFOH: I don't agree.
MR.OSEI-AFRIYIE: Did you say that you wanted, I believe you did it in writing that you wanted(unable to hear words) Way cause you put down a bigger portion of the downpayment of $9,000.00 and you wanted to be a family for you and your children?
MS. AMPOFOH: Yes.
MR. OSEI-AFRIYIE: Why then wouldn't you agree with me that I put down a bigger portion of a downpayment on 25 Spruce Road so it should be given to me?

Supreme Court, U.S.
FILED
APR 29 1998
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No. 97-1609

In The

Supreme Court of the United States

October Term, 1997

FRANCIS OSEI-AFRIYIE,

Petitioner,

vs.

GRACE AMPOFOH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

I. The Trial Court did not exceed its jurisdiction because it did not order the sale of a non-marital asset. Since the Trial Court did not order the sale of nonmarital property, it did not deprive Petitioner of his property interest in the property. Since there was no deprivation of Petitioner's property interest, due process protections did not attach and thus, there could be no violation of Petitioner's due process rights.

II. Even assuming that the Trial Court exceeded its jurisdiction by ordering that money be paid to Petitioner after the sale of an asset outside the Court's jurisdiction, Petitioner's argument is mooted because the nonmarital property was transferred shortly after the Trial Court's Order and Petitioner received the payment ordered by the Trial Court. Consequently, there is no remaining justiciable case or controversy over which this Court can assert jurisdiction. The Petition for Writ of Certiorari effectively asks this Court to render an advisory opinion.

III. Petitioner has failed to clearly articulate at any judicial level what actually is his basis for an equal protection argument. Petitioner's equal protection argument is flawed in that Petitioner relies upon several misstatements of the Trial Court's ruling in his attempt to construct an equal protection argument. Additionally, Petitioner's equal protection argument should be denied because he did not allege said claim in a timely fashion in the State Courts. Petitioner alleged this equal protection claim for the first time in his Motion for Reargument directed to the Delaware Supreme Court after he had the opportunity to fully present his arguments in both his Opening Brief and his Reply Brief in the same court.

IV. The Trial Court sustained Respondent's objection against two witnesses being allowed to testify. One witness

would have testified as to the value of certain property but the parties disagreed about whether the property was marital and, therefore, such testimony was premature. The second witness would have testified as to the ownership but was not competent to testify about the law of Ghana. The Trial Court simply made an evidentiary ruling which was consistent with Delaware rules of procedure and evidence, not a violation of due process.

STATEMENT OF THE CASE

Petitioner's application for a writ of certiorari contains extensive extraneous material and several critical misstatements of fact and law. Respondent offers the following pursuant to United States Supreme Court Rules 15 and 24(g).

The petition involves an appeal from a State Trial Court's findings, conclusions and rulings relative to the division of marital assets between divorcing parties pursuant to a state statute. The Delaware property division[1] statute sets out what factors a trial court may consider in reaching its decision of how to divide the assets and liabilities. While the factors are broad, the trial court may neither ignore those factors, nor consider additional ones. Because it is a statutory court and not a constitutional one, the Delaware Family Court's jurisdiction is limited to what is granted in its enabling legislation.

A. Nature of the Proceedings.

Petitioner (hereinafter "Husband") and Respondent (hereinafter "Wife") were divorced by decree of the Family Court of the State of Delaware. The Family Court conducted a bench trial to hear and decide matters ancillary to the divorce (primarily, the issue of the appropriate division of the marital estate). The Family Court issued is Opinion and Order on the ancillary matters. No post trial motions were filed.

1. 13 Del. C. § 1513(a).

Husband later perfected an appeal to the Delaware Supreme Court.[2] On January 7, 1998, after the parties had completed briefing, the Delaware Supreme Court issued a brief Order affirming the Family Court's judgment and "well-reason[ed] decision." *See* Petitioner's Writ of Certiorari at 16a. Husband then filed a Motion for Reargument, which was denied in an Order by the state Supreme Court on January 26, 1998. *See* Petition at 17a. Husband filed his Petition for a Writ of Certiorari on or about March 30, 1998. This is Wife's Brief in opposition to Husband's Petition.

B. The Parties' Marriage and Divorce.

Husband and Wife were married 15 years before the Family Court entered its decree divorcing them. During their marriage, the parties acquired several valuable properties, both real and personal, including:

(1) their marital home, located in Delaware;

(2) four rental properties, also located in Delaware;

(3) several bank accounts;

(4) pension rights and deferred compensation accounts; and

(5) miscellaneous personal property such as household furnishings and cars.

Also during the marriage, Wife, a native of Ghana, sent several thousand dollars to her family who remained in Ghana. Some of this money was sent at Wife's own initiative, when she became concerned about her parents' and siblings' inadequate housing; some was requested by her father. In both cases, Wife

2. Appeals from the Family Court are to the Delaware Supreme Court without intermediate appellate review. 10 Del. C. § 1051(a).

intended that the money be a gift with no expectation of repayment. Some of the money was used by Wife's family to construct a house on land Wife's father had previously acquired in Ghana (hereinafter "the Ghana property"); one of Wife's brothers also contributed money to the construction costs. The house was intended to be a home for Wife's family still residing in Ghana.

Some months *after* their divorce, the parties purchased a fifth Delaware rental property (hereinafter "the Hancock Street property"), taking title as tenants in common. The parties shared the purchase price of the Hancock Street property evenly, consistent with a practice and an agreement they followed during their marriage. Throughout their long marriage, Husband and Wife essentially contributed equally to the payment of their normal household expenses. This sharing was regularly and precisely tallied and reconciled by the parties, reimbursing each other for any imbalances. Husband and Wife also contributed equally to the acquisition costs of their marital home and their investment properties. Each party maintained their own and joint bank accounts and investment vehicles.

C. The Petition Misrepresents the Trial Court's Factual Findings.

Throughout his Petition, Husband cites portions of the trial record which are favorable to his position and then argues as if there was no dispute about the claimed facts. However, many times his claims and statements of alleged facts were hotly disputed at the trial. For example, Husband states that he "was responsible for all expenses . . ." for a two year period while the couple resided in Canada. *See* Petition at 7. Wife emphatically denied this version of the facts at trial, stating that she paid one–half of all expenses throughout the marriage. The Trial Court found "Husband's contentions to have little to no

merit. As discussed earlier, it was undisputed that the parties both contributed exactly half towards all expenses and acquisitions." *See* Petition at 11a.

Another example of Husband's partial description of facts contained in the record is his claim that "[W]ife also withdrew over $4,800 from a joint account and deposited it into her individual account." *See* Petition at 8. What he failed to tell this Court is that Wife also left $4,800 in the account so that the total distribution of that account was equal, *a fact that Husband appeared to admit at trial under cross-examination*. Presumably, these discrepancies are due to Husband's lack of understanding of his responsibility to fully and fairly portray the record, as he is not a lawyer.

The Trial Court resolved the competing factual contentions between the parties and a detailed refutation of each of Husband's misstatements will not be attempted here. The Trial Court's findings and conclusions were sufficiently supported by the record so as to warrant the Delaware Supreme Court affirming the decision[3].

D. The Petition Misrepresents how the State Trial Court Applied the Delaware Law Relative to the Burden of Proof, Evidentiary Rulings and Consideration of the Statutory Factors Supporting its Decision.

In its written order, the Family Court analyzed each of the factors it is statutorily required to consider by Delaware's domestic relations law. *See* Petition at 1a. After considering these factors, the Court concluded that the marital assets should

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3. Under Delaware law, a trial court's finding of facts will be set aside if they are found to be clearly wrong and justice so requires. *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, Del. Supr., 402 A.2d 1202 (1979). *In Re Estate of Margaret A. West*, Del. Supr., 522 A.2d 1256 (1987).

be evenly divided between Husband and Wife. *Id.* The Trial Court's Order dividing the marital property did *not* include either the Ghana property or the Hancock Street property in the distribution. *Id.*

1. *The Hancock Street Property.*

The parties agreed at the ancillary hearing that the Hancock Street property was purchased after their divorce. Consequently, the Family Court concluded that the property was not a marital asset and was not subject to division by the Family Court. Contrary to Husband's assertions and statements in his Petition for Writ of Certiorari, the Family Court did *not* "issu[e] an order that a non-marital property . . . be sold . . ." *See* Petition at i, Question Presented 1. *See* also Petition at 9 ("[T]he court issued an order on a non-marital property over which it had no jurisdiction . . ."). The Family Court's Order[4] *did* require Wife to pay Husband the cash necessary to equalize the Court's distribution of the actual marital estate within two months of the sale of the Hancock Street property. *See* Petition at 15a.

2. *The Ghana Property.*

Husband testified at the Family Court trial about Wife's contributions to the Ghana property in an effort to show that Wife had "acquired" the property during the marriage as required under Delaware law to qualify an asset as part of the marital estate. The parties' disagreement at trial about the Ghana property was not with what had happened, *i.e.*, the facts, but rather with the legal significance of those facts, *i.e.*, the conclusions to be drawn.

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4. This provision was actually included in a footnote to an Exhibit to the Court's Order, raising questions as to whether it was even an Order of the Court.

Husband asked to present the telephone testimony of witnesses from Ghana purportedly to speak to the property's ownership and value. The Trial Judge sustained Wife's objections to this testimony, noting that neither party had proffered competent evidence of property law in Ghana, that Husband had offered no testimony rebutting that the property had been "acquired" by Wife's father, not Wife, and that the Court already had before it Husband's testimony and documentary evidence suggesting Wife's ownership. The Trial Judge also stressed that telephone testimony "should be discouraged and should only be used in exigent circumstances and only where both parties waive their constitutional rights to confrontation." *See* Petition at 54a.

Husband also argues he was denied equal protection of the law because the Trial Judge did not require Wife to prove that the Ghana property was exempt from the marital estate. Husband again misunderstands the Family Court's ruling. Wife denied any ownership interest in the Ghana property. Consistent with Delaware law, the Trial Judge required Husband, as the proponent of the alleged marital asset, to show that the property was "acquired" during the marriage.

Had Husband met his initial burden of proof, then Husband is correct that the evidentiary burden would then have shifted to Wife to prove why the Ghana property should be excluded from the marital estate. The Court concluded, however, that Husband never met his initial proof of showing that Wife "acquired" the property during the marriage and, hence, the Court never reached the question of whether it should be excluded. Husband has not made a showing that Delaware's laws are disparate in their application or their result.

REASONS FOR DENYING THE WRIT

I.

HUSBAND'S CLAIM THAT THE TRIAL COURT DENIED HIM DUE PROCESS OF LAW WHEN IT DELAYED HIS PAYMENT IS NOW MOOT AS THERE NO LONGER IS ANY CASE OR CONTROVERSY.

Article III of the United States Constitution limits the jurisdiction of the Supreme Court to hearing only a "case or controversy." One of Husband's claims in support of his Petition for Writ of Certiorari is that the Trial Court conditioned payment of an amount due to him on an event outside of its jurisdiction and, therefore, denied him due process of law as guaranteed by the Fourteenth Amendment.

The relevant facts disclose that there no longer is a case or controversy worthy of this Court's attention because Wife has paid Husband the sum determined to be due him by the State Court. *California v. San Pablo & Tulave R. Co.*, 149 U.S. 308, 313-314 (1893). This sum was determined to be due by the Trial Court at the conclusion of a marital property division hearing after the parties had divorced pursuant to the relevant state statutes contained in Title 13 Delaware Code Chapter 15, *et seq.*

The Trial Court determined that an appropriate division of the marital assets and liabilities resulted in Wife owing Husband the sum of $26,024, to be paid two months after the sale of the Hancock Street property, an asset owned by the parties but not part of the marital estate. *See* Petition at 15a. Husband acknowledges that he accepted payment of this sum on March 9, 1998. *See* Petition at 29, n.3. Thus, Wife submits that this issue has ceased being a controversy.

Husband counters the question of mootness by suggesting that the Trial Court might repeat this mistake in the future in the case of other litigants and, therefore, this Court should grant his Writ. Most recently this Court reaffirmed its concern about mootness when it specifically declined to endorse the practice of assuming jurisdiction for the purpose of deciding the merits, a practice known as the doctrine of hypothetical jurisdiction. *Steel Co. v. Citizens For a Better Environment*, 118 S. Ct. 1003, 1012 (1998). Husband's concern about the possibility of future actions is speculative and "conjecture at this point." *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972). This Court has previously ruled such speculation is an inadequate reason to continue jurisdiction. *Id.*

While this Court does have the discretion to look beyond the fact of the payment if it believes a justiciable case or controversy continues to exist, there is nothing about this case that warrants such extraordinary consideration. The mootness question in this case is analogous to the one raised in *DeFunis v. Odegaard, et al.*, 416 U.S. 312, 317 (1974). There, the petitioner had been denied admission into law school. *Id.* at 314. During oral argument before this Court the school confirmed that the petitioner had been recently granted admission and would be allowed to proceed like any other student. *Id.* at 315. The petitioner argued that the school might somehow reverse its position or otherwise impair his chance of graduation in the future. *Id.* The court concluded that petitioner's unsubstantiated fear was not sufficient to treat the matter as a case or controversy and observed that "[a] determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result. . . ." *Id.* at 317.

There are numerous cases which outline the reasons why a matter must be a "case or controversy" to comply with the Court's constitutionally mandated, jurisdictional limits. One of

the reasons is succinctly stated in the case of *Lewis v. Continental Bank Corp.* 494 U.S. 472 (1990). There the petitioner was a bank holding company that had been denied the right to open a branch bank in another state. *Id.* at 473. The statutory reasons relied upon by the Banking Commissioner were amended during the appeal process in such a way that the applicant bank could no longer qualify for other reasons regardless of how the constitutional issue then before the Supreme Court was resolved. *Id.* at 475-76. This Court said ". . . a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. . . ." *Id.* at 477. The Court went on to say that it is not enough that a dispute existed when the suit was filed or review was obtained but rather "The parties must *continue to have a 'personal stake* in the outcome' of the suit." (Emphasis added). *Id.* at 477-78.

What Husband is in reality seeking is an advisory opinion, since he has been paid in full by Wife. Advisory opinions may be what Husband wants to satisfy some personal desire but it is simply and quite clearly beyond this Court's jurisdiction.

Finally, Husband's due process argument with respect to the Hancock Street property misstates the Trial Court's ruling. The Family Court did *not* order the sale of this property; it simply used the parties' voluntary sale of the property as the triggering event for Wife to pay Husband the money due him as part of the marital estate distribution. Since Husband was not deprived of a property interest by the Trial Court's ruling, no due process rights attached and, thus, there could be no due process violation.

II.

CERTIORARI SHOULD BE DENIED BECAUSE HUSBAND MISSTATES THE STATE COURTS' RULINGS AND DID NOT PROPERLY RAISE HIS CONSTITUTIONAL ARGUMENT IN THE STATE COURTS.

Husband also seeks his Writ on the grounds that he was denied equal protection under the Fourteenth Amendment because the Trial Court did not require Wife to show that the Ghana property and the parties' pension and deferred compensation accounts should be excluded from the marital estate as required by state law. First, Husband misstates the Trial Court's ruling. The Family Court concluded that Husband had not shown that the Ghana property was "acquired" during the marriage, and thus, that it was even marital property, a burden placed on Husband by state law. *C.Q. v. Norman J.Q.*, 452 A.2d 951, 954 (Del. Supr. 1982). Because the Ghana property never became part of the marital estate, there was no burden on Wife to show that it should be excluded.

The Trial Court *did* conclude that the parties' pension rights and deferred compensation accounts were marital property and then concluded that the equitable distribution of the assets was to allow each party to retain the accounts titled in their name noting that it would be "inequitable to now attempt to split the accounts and equalize the balance to the detriment of the more frugal party." *See* Petition at 13a. The Trial Court made specific findings of several facts to support its conclusion, including that:

(1) both parties were employed throughout the marriage;

(2) Wife began working within a few days of arriving in Canada from her home in Ghana;

(3) the parties maintained separate bank accounts;

(4) the parties contributed exactly half towards all expenses, including utilities and groceries;

(5) even the phone bill was divided equally and each spouse was expected to pay for their own long distance phone calls;

(6) each of the parties throughout the hearing referred to these accounts and money as "my money" and "my account;"

(7) contributions towards the purchase price and settlement costs of the marital homes and rental properties were essentially split equally between the parties;

(8) some of Husband's requests for credit were "frivolous and unfounded;" and

(9) "for approximately 15 years, Husband and Wife managed their separate earnings and agreed to their specific financial arrangement." *See* Petition at 6a-13a.

Under Delaware law, a trial judge's findings will normally be approved when the factual determination turns on a question of witness credibility and the acceptance or rejection of live testimony by the trial judge. *Barks v. Herzberg*, 206 A.2d 507, 508 (Del. Supr. 1965). This is true so long as there is sufficient evidence to support the findings of the trial judge, especially when based on live testimony. *Brittingham v. American Dredging Co.*, 262 A.2d 255, 257 (Del. Supr. 1970). Husband's arguments to the contrary, this is the effect of Delaware Supreme Court's rulings affirming the Trial Court's Order.

Secondly, Husband did not present his equal protection argument to the Trial Court or to the Delaware Supreme Court in his appellate briefing. Husband did generally allege, for the first time, in his Motion for Reargument to the state Supreme Court, that there had been a "disregard of equal protection of the law by the trial court." *See* Petition at 21a. The Motion for Reargument did not indicate whether the alleged equal protection violation was state or federal, offered no authority supporting the argument, did not explain why the issue was being raised for the first time on a post-decision motion in the State's highest Court and did not comply with Delaware Supreme Court Rule 8 mandating that only issues fairly raised to the trial court be presented for review. *Id.* Husband's failure to properly present his equal protection argument to the Delaware Supreme Court, and that Court's lack of decision on Husband's argument, means that his Petition for Writ of Certiorari should be denied. *Adams v. Robertson*, 117 S. Ct. 1028, 1028-1029 (1997).

III.

HUSBAND'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE DENIED WHEN HE WAS NOT ALLOWED TO HAVE WITNESSES TESTIFY BY TELEPHONE IS IN REALITY A CLAIM THAT THE TRIAL COURT SHOULD HAVE ABANDONED ITS OWN RULES OF PROCEDURE, NOT TO PROTECT HUSBAND BUT RATHER TO ALLOW HIM TO CIRCUMVENT THE RULES' SAFEGUARDS.

Husband claims that he was denied a full and fair hearing because of the Trial Court's refusal to allow two witnesses to testify by telephone from Ghana rather than in person and in open court as required by the Trial Court's rules of civil procedure. Delaware Family Court Rule 43(a) is nearly identical to Federal Rule of Civil Procedure 43(a) and reads in pertinent part:

> In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these Rules, by statute or by order for cause.

Husband claimed that the witnesses would testify about two points: (1) the value of a house in Ghana which Husband claimed to be marital; and (2) who had legal title to the house in Ghana. Wife objected to this method of testimony upon various grounds including: the uncertainty of verifying the witnesses' identity or that their testimony was sworn, inadequate cross examination opportunity and impossibility of the fact finder viewing the witnesses' demeanor which could become crucial in judging their credibility.

Husband further wanted the witnesses to be allowed to testify as to how lawful title to land was established in the countryside of Ghana. One of the witnesses was a tradesman and the other a professor of sociology, neither of whom were licensed in Ghana as a lawyer nor otherwise qualified as a lawyer so far as Husband knew. Wife also objected to either of these witnesses testifying since their competency to testify about a matter requiring expertise had not been established.

The Advisory Committee notes to the 1996 Amendments to Federal Rule of Civil Procedure 43(a) summarizes the concerns generally expressed by both the state and federal trial courts about testimony other than in open court in the following passage:

> Contemporaneous transmission of testimony from a different location is permitted *only on showing good cause in compelling circumstances*. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact finder may exert a powerful

> force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission by telephone cannot be justified merely by showing that it is inconvenient for the witness to attend trial.

(Emphasis added). The Committee went on to note that "good cause in compelling circumstances" usually meant unexpected circumstances, such as accidents or illness, not mere inconvenience. Fed. R. Civil Procedure 43(a) Advisory Committee note. They further noted that other possible justifications "must be approved cautiously." *Id.* Husband offered no explanation of unexpected circumstances, except a claim of surprise, a claim the Trial Court decided against Husband.

The courts have commented that the Federal Rules of Civil Procedure "strongly favor" live testimony in "open court" and that the "[s]tate courts have almost universally condemned testimony by telephone unless both parties have consented." *Murphy v. Tivoli Enterprises*, 953 F.2d 354, 358-59 n.2 (8th Cir. 1992). This is precisely what the Trial Judge told Husband when he first argued to allow the witnesses' testimony by telephone.

The courts have affirmed on numerous occasions that

> [t]he primary purposes of Rule 43(a) are to insure that the accuracy of witnesses' statements may be tested by cross examination to allow the trier of fact to observe the appearance and demeanor of the witnesses.

In Re: Adair, 965 F.2d 777, 780 (9th Cir. 1992). These are some of the very objections raised by Wife to the Trial Judge.

What has Husband shown that would warrant this Court reversing the Trial Court's decision to follow its rules, particularly when its rules mirror the federal rules? Husband was allowed to testify himself about all of the matters for which the other witnesses were proffered, so that their testimony would only have been cumulative at best. The Court ruled during the trial that the financial contributions made by the Wife to her parents' home improvements were not done with the expectation of ownership but rather were motivated simply out of concern and affection for her parents. In other words, Wife's contributions were a gift, not the acquisition of a marital property interest. For those reasons, the Trial Court concluded that the property in Ghana was not marital and, therefore, any testimony about its value was irrelevant.

The Trial Court's ruling presumably included consideration for other rules as well. For example, Delaware has adopted the Uniform Rules of Evidence which:

(1) allow testimony to be excluded if the probative value is outweighed by the "danger of unfair prejudice" D.R.E. 403;

(2) allow the court to control the mode of testimony "so as to make the interrogation and presentation effective for the ascertainment of the truth." D.R.E. 611(a)(1); and

(3) permit testimony requiring specialized knowledge to be given only by witnesses who are competent to do so as shown by their special knowledge, training, education, *etc.* D.R.E. 702.

These rules further support the Trial Court's analysis and decision.

Due Process ". . . is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Rather, it is a weighing and balancing of:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

Proof of a denial of due process must show not only prejudice but that the prejudice has been "substantial." Indeed, it has been said that a petitioner ". . . will need a strong case . . ." before a denial of due process can be shown when the process under attack has been practiced for a long time. *Jackman v. Rosenbaum, Co.*, 260 U.S. 22, 31 (1922).

What the Trial Court did to Husband was require him to follow the same rules of procedure and of evidence that are applicable to everyone in Delaware and that have been applied for decades. These are the same rules of procedure and evidence that have been adopted by most, if not all, states and by the federal courts. Husband has offered *no* authority for the proposition that a trial judge's evidentiary ruling excluding duplicative telephone testimony without a showing of exigent circumstances violates the Fourteenth Amendment's guarantee of due process. Husband's complaint in reality is that he was required to follow the rules just like everyone else — an application of due process, not a denial of it! If Husband had been allowed to proceed as he had wanted then it is Wife who would have had the claim of a denial of due process.

CONCLUSION

Husband has failed to show that any of his claims violate any portion of the United States Constitution or otherwise present any important federal question. As a consequence, his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
MAY 11 1998
CLERK

No. 97-1609

.....

IN THE SUPREME COURT OF THE UNITED STATES
March Term, 1998

.....

Francis osei-Afriyie,

Petitioner,

v.

Grace Ampofoh,

Respondent.

.....

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

.....

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
MARCH Term, 1998

.....

FRANCIS OSEI-AFRIYIE,
PETITIONER,

V.

GRACE A. AMPOFOH,
RESPONDENT

.....

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

.....

RESPONSE TO SUMMARY OF ARGUMENT

I. The trial court did exceed its jurisdiction by indirectly ordering the sale of a non-marital property to satisfy cash payment. Nevertheless, property award must be satisfied out of existing property. *Sidwell v. Sidwell*, 165 A. 334, Del.Super.,(1933), and *Beres v. Beres*, Del. Super., 154 A.2d 384 (1959). The question which arises is this: If the property was not sold, **how** <u>and</u> **when** was respondent to pay petitioner?

II. The non-marital property was not transferred after the trial court's Order. Acceptance of amount adjudged due is not inconsistent with the claim that judgement is not large enough and appeal may be maintained. See, pp.5-7.

III. Petitioner correctly states the trial court's rulings. Petitioner alleged equal protection of the laws and due process violation in his Opening brief,pp.14-15, 18,22 and Reply brief reproduced in its entirety in the appendix to this reply, ATWRB, pp.5a, 12a, 19a-20a. Opening brief p. 22 states:

> Also by denying petitioner a full and fair opportunity to litigate the action, the trial judge denied him due process under the 14th Amendment to the United States Constitution.

IV. Fact witnesses. Testimony from the witnesses would have included facts on the ownership of the Ghana property. Dr. Owusu-Akyaw was an agent of respondent and Ernest was her employee.
Appendix to Delaware brief, pp.189-190.

C. The Petition does not misrepresent the trial court's factual findings.

The respondent ordered supplemental transcript consisting of more than 366 pages. But she makes no reference to pages in the transcript. Instead, she relies on the trial court's erroneous findings of fact and conclusions of law which were the basis of the appeal in the first place. For instance, the trial court found that:

1. Wife was always employed during the entire length of the marriage; appendix

to petition (AP), p.10a. But see appendix to reply brief to this Court. (ATWRB), p.33a. Wife testified that she was unemployed for 7 months in 1984.

During that period, petitioner was responsible for all expenses. Also, throughout the parties' stay in Canada, petitioner was responsible for health and dental care insurance for the family. The premiums were deducted from his salary by the University. Opening brief, p.5.

2. She contributed from the very beginning of the marriage exactly half of all expenses; AP, p.10a. But see AP. pp.60a-61a, and petition, p.7.

3. Wife began working as early as her first day in Canada after coming over from Ghana, Africa. AP. 9a. But see brief in opposition (OB),p.12 (2).

Respondent's defense of the trial court's, Findings, Conclusions and finally Decision and Order was expected. This is because the Decision and Order contained a wholesale adoption of her request in her Rule 52D filing, including her request to permit wife to pay husband any balance deemed owned by the court after sale of Hancock property and distribution of proceeds. ATWRB, 25a-28a,37a-39a.

Contributions made by the parties are stated in Opening Brief, pp.6-10. Wife withdrew more than $4,800. Petitioner's response on cross-examination is found at

AP. 41a-43a. It is important to note that petitioner spent the money left in the joint account on the rental properties.

The trial court's findings and conclusions were not supported by the record and, as a matter of law, the Delaware Supreme Court should have reversed the decision.

D. The Petition does not misrepresent the trial court's application of Delaware law.

The trial court did not adequately and properly consider 13 *Del. C.* 1513. In fact, the trial court failed to comply with its own rulings in the distribution. Petition, p.9.

1. **The Hancock Street Property**

This is addressed below under I.

2. **The Ghana Property**

Petitioner does not argue that the trial court was required to place the burden of proving that the property was marital on respondent. On the contrary, he argues that the trial court denied him a full and fair opportunity to call and examine his witnesses who had knowledge about the ownership of that property. Petition, pp. 19-23. Indeed, it is significant to point out that on direct examination the respondent could not

provide a satisfactory answer relative to the ownership of the property. AP,pp.49a-50a.

REASONS FOR GRANTING THE WRIT

I.

The denial of due process by the trial court when it delayed payment is not moot. Judiciable case still exits.

The general rule is that when a judgement has been satisfied, it has passed beyond review, for the satisfaction thereof is ``the last act and end of the proceeding.'' *Klebora v. Klebora*, 5 P.2d 965, at 969,973 (1st D.Ct of App. 1931). But the settled law is that``where the only question on appeal is whether the recovery should be greater than that allowed by the trial court, the acceptance of an amount adjudged due is not inconsistent with the claim that the judgement is not large enough and the appeal may be maintained. *Clarke v. Angelus Memorial Association*, 58 P.2d 974, 975 (2d D.Ct of App. 1936); Also, see *Harrold v. Harrold*, 224 P.2d 66, 68 (1950) in which the court stated that it was not the from the judgement in her favor that wife appealed, but from that portion of the judgement denying her the full relief requested.

In the case at bar, petitioner indicated in his brief to the Delaware Supreme Ct. p.16, that he had submitted his request in his Family Court Rule

52(d) filing, pointing to the appendix, A3-A17. He stated that his request included (1) division of the 4 rental properties, the marital home and the house in Ghana; (2) distribution of net rent from the rental properties; (3) division of personal property, (4)accrued expenses on the marital home and (5)attorney's fees. He also pointed out later that he had requested reimbursement of Mr. Owens' fees. See ATWRB, pp.30a-32a.

Again, he indicated in his reply brief to the Delaware Supreme Court that the trial court distributed only the 4 rental properties and the marital home. See AP, p.15a, Exhibit A. He also pointed out that the trial court failed to at least consider respondent's monetary contributions which the court ruled it would do. AP. 54a-55a. Therefore, considering the above only, a justiciable case or controversy still exits and the parties ``continue to have a`personal stake in the outcome' of the suit.'' *Lewis v. Continental Bank Corp.* 494 U.S. 472 (1990) at 477-478.

Furthermore, respondent had requested in her Rule 52D filing that the court delay her payment of any balance deemed owed until the sale of the Hancock property and distribution of the proceeds. ATWRB, p. 28a. That request was granted to the detriment of petitioner. Petitioner lost the use of his funds due

him for 9 months and had to pay exorbitant interest on an amount he borrowed from a bank. Hence, he has suffered an actual injury traceable to the respondent which is likely to be redressed by a favorable judicial decision. Lewis, id., 477.

Considering everything in the context of the record, and petitioner's reliance on *Lewis*, *Klebora* and *Harrold, ibid.*, a judiciable case or controversy still continues and the writ must be granted.

Also, the writ must be granted because a spouse's acceptance of payments under the alimony, property settlement, or child support provisions of a decree judgement was held not to estop him from seeking a more favorable award on appeal where the other spouse failed to cross appeal altogether or with respect to the correctness of the award accepted. See for instance, *Marshall v. Marshall*, 364 P.2d 891 (1951, Okla); *Hofer v. Hofer*, 415 P.2d 753 (1966, Or); *Hancox v. Hancox*, 203 NE.2d 613 (1964, Ill) and *Cohen v. Cohen*, 228 P.2d 54 (1951, Cal).

II.

PETITIONER DOES NOT MISSTATE THE STATE COURTS' RULINGS AND DID PROPERLY RAISE HIS CONSTITUTIONAL ARGUMENTS IN THE STATE COURTS.

The response to respondent's argument about misstatement on the Ghana property has been addressed above under D(2), p.4.

Pension, deferred compensation accounts, bank account balances, etc.

The trial court's rationale for refusing to apply a 50/50 division to those accounts is found at AP. 13a-14a. However, this rationale was derived from respondent's request stated in the appendix to this reply brief, ATWRB, pp. 38a-39a. Put briefly, ``...Mrs. Ampofoh should be awarded greater than 50% and the way to accomplish that is to award her the balance in the accounts that she herself saved. She was more frugal than Mr. Osei-Afriyie.'' This is not so much a legal argument but rather it is an invitation to ignore the law and indeed she succeeded in doing that.

But the Delaware Legislature has stated in language too clear to be misunderstood that ``all property acquired by either spouse during the marriage, regardless of how such property be titled is ``presumed'' to be marital property, subject to division by the Family Court upon divorce. 13 *Del. C.* Sec. 1513(a)(c). Sec. 1513(b), however, provides 4 exceptions as enumerated in the Petition, p.12. The burden of proving exclusion from division falls on the proponent. Consistently, this mandatory statute has been construed and applied for several

years by Delaware courts. See Petition, p. 13. Additionally, Delaware courts have stated that control or management of a marital property by individual spouse does not determine its disposition. Petition, p.13.

The trial court's rationale ignores the specific mandate of 13 Del. C. Chapter 15 and to that extent amounts to a judicially legislated repeal of those sections. It is fundamental that the courts should not substitute their standards of social policy for those of the Legislature. In the present situation, the body has cleary stated all marital property must be divided by the Family Court with a few enumerated exceptions. If the social policy of the State of Delaware should be to exclude marital property under the control and or management of an individual spouse from division, the remedy is for the Legislature to amend 13 Del. C. Chapter 15.

III

DUE PROCESS RIGHTS DENIED WHEN PETITIONER WAS NOT ALLOWED TO CALL AND EXAMINE HIS WITNESSES.

There are exceptions to court rules and the Sixth Amendment to the U.S. Constitution. Due to page limitation and also in the interest of brevity, petitioner's response is found in the appendix to this reply brief, pp.8a-13a.

Furthermore, respondent only quotes a portion of note 2 from *Murphy v. Tivoli Enterprises*, 953 F.2d 354, 358-359, (8th Cir. 1992). It continues, `` State courts have permitted telephone testimony only under special circumstances, or when the parties have consented.'' Quoting Ferrante by Ferrante v. Ferrante, 485 N.Y.S.2d 960, 962(1985).

Finally, petitioner relies on United States v. Weber, 437 F.2d 327 (1970) for the citations therein on cases about the Sixth Amendment exceptions. Among them is *Dowell v. United States*, 221 U.S. 325, 330 (1911). In Dowell, this Court said:

*** this general rule of law [the right to confrontation] embodied in the Constitution***, and intended to secure the right of the accused to meet the witnesses face to face, and thus sift the testimony produced against him, has always had certain well recognized exeptions.''

CONCLUSION

The petition for a writ of certiorari should be granted.

Respecfully submitted,
Francis Osei-Afriyie
P.O.Box 185, Dover, DE 19903-0185
Pro-se Petitioner, (302) 678-5733
May 1998

APPENDIX TO REPLY BRIEF

(ATWRB)

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ARGUMENTS

RESPONSE TO ANSWERING BRIEF ARGUMENT I.A.

The Respondent fails to understand the legal argument. The argument is not about the fact that the trial court did or did not abuse its discretion. Rather, it is about errors in the application of the law. Two legal errors are raised which respondent fails to address. These are:

(1) Delaware law requires that in property division following a divorce, when one party wants an asset acquired during marriage excluded from division, the trial court **must** inquire whether that asset falls within any of the four statutory exclusions enumerated under 13 *Del. C* Sec. 1513(b). In this particular instance, the trial court failed to do that and hence an error was committed.

Respondent contends that``What the Trial Court did was to distribute and assign those assets in a way that was unsatisfactory to Appellant.'' Answering brief (Ans.B), p.9. One only needs to read the court's June 6, 1997 Order. A27-A36. Therein, the court lists the marital assets at A27 through A30. These assets include pension and deferred compensation plans, motor vehicles and bank accounts. A29. The court also concludes:

> Husband is requesting a 57%-43% division of the marital estate in his favor. Wife is requesting a 50%-50%

division. ...Based upon this unique arrangement that existed between the parties during their entire marriage and the comparable current economic situations, it would be inequitable now to divide the marital estate other than through a 50/50 division. **Accordingly, the marital estate is divided as set forth in the attached `` Exhibit A''.** (emphasis added). A34.

Exhibit A is found at A36.

Clealy, an examination of Exhibit A **does not** include pension and deferred compensation plans, motor vehicles and bank accounts which the court had listed as constituting a part of the marital estate. However, in order to exclude those assets from division, the burden was on respondent to show that they fell within one of the four statutory exceptions and were, therefore, not subject to division between the parties. *Gregg v. Gregg,* Del. Supr. 510 A.2d 474, 478. The trial court failed to require respondent to carry this burden as it was required to do under guideline number 3(a) established by this Court in Husband R.T.G. v. Wife G.K.T.,Del. Supr., 410 A.2d. 153, at 159. Obviously, the trial court did not follow guidelines and the law.

(2) Also, under Delaware law, the fact that an individual spouse may have control over marital property, and thus

determine its placement into either a joint or separate account, or into other property, is not dispositive of the legal issue of its characterization for the purposes of property division. *Halsey v. Charlotte*, Del. Fam. Ct., 419 A. 2d 962, (1980) at 965. Respondent does not address this law. However, the trial court distributed the marital estate based upon management and control contrary to the law. That too was an error.

Respondent concedes paragraph 6 contained in her 52D is incorrect. She now admits, ``Initially Appellant contributed more towards these expenses... The parties' contributions to specific household expense was not always equal...'' Apart from the marital home to which she contributed over $2,000 more than petitioner, she does not specify which household items or other real estate she made more contributions than petitioner. Indeed, there is none. Also, for the most part, she does not deny petitioner's statement of fact as stated in his opening brief, pp.3-11. Therefore, the court's findings in opening brief, p.31 is incorrect.

Petitioner never suggested that the parties shared expenses 50/50. A71. Neither did he keep obsessive watch at expenses. In fact, not only did he spend more money on all expenses, he also bought a car to transport respondent to work. A126.

MR. OSEI-AFRIYIE: Did I have a car before you came to Canada?
MS. AMPOFOH: No.
MR. OSEI-AFRIYIE: When you were on day shift did I have a car while we used to live at Simon Fraser University?
MS. AMPOFOH: Well you bought a car because you got tired of walking me down to the hill. So you bought a car but I really don't know what is that month you bought a car.
MR. OSEI-AFRIYIE: So I bought the car to use for the purpose of transporting you to work and picking you up?
MS. AMPOFOH: I wouldn't say a hundred percent. You bought it and used it to.
MR. OSEI-AFRIYIE: Did I ever drive you, pick you up from Hampton Court or (unable to hear word) first im my own car and then in your car?
MS. AMPOFOH: Yes.

It should be noted that the expenses on petitioner's car were paid by him. They included insurance, sales tax, maintenance, registration and gasoline.

RESPONSE TO ANSWERING BRIEF ARGUMENT I.B.

Ancillary to the Family Court's general power, it may divide marital property, award alimony, and grant attorney's fees sought by the parties. 13 Del. C. Secs.

1512, 1513 and 1515. This Court stated in Husband, id., (1979) at 159 that the Family Court shall act only ``upon request of either party.''

In the case at bar, petitioner's request is stated in his opening brief, pages 17-18. The court's Order does not address petitioner's request for attorney's fees and costs. Instead, the trial court granted respondent's request on the **Hancock property**, a non- marital asset. Respondent's check was returned to her pending the outcome of the appeal in this Court. See Appendix to Petitioner's Reply Brief, A (R.B.) at 1. She knew her request was against the law. Here, we are dealing with the conduct of the trial court on a non-marital property. Hence, respondent should not be permitted to rush to pay petitioner a disputed amount on the day her answering brief was due in order to correct the court's improper conduct. Whether or not such conduct violated petitioner's guaranteed **constitutional right to be notified** and given an **opportunity to be heard** before judgement on the **Hancock property** is for this Court to decide . Accordingly, the issue is not moot. It is still alive.

Ghana Property

Respondent testified about the land as follows:

MS. AMPOFOH: ``... So my brother and me we started sending home money to my dad and my dad acquired the land...'' A88.

The above should be read in conjunction with petitioner's unrebutted testimony on how Ghanaians abroad acquire properties in the villages through their relatives who live in Ghana, A94-A95 and why respondent's parents were divorced, A101.

Marital Home/Rent and Expenses.

Rental income was resolved in court. It was established that respondent had positive rent income on all the properties. A141. However, although put on notice, she failed to bring receipts for her expenses to the courtroom. A144. Whatever expense receipts she had were attached to petitioner's April 30, 1997 letter to the court. A199-A204. The trail court never relinguished its responsibility to oversee the division of the rental income and expenses. Opening brief, pp.19-20; A(R.B), P.2.

RESPONSE TO ANSWERING BRIEF ARGUMENT II.

The parties had agreed for the Trial Court to consider the capital gains tax consequences on the rental properties. A49. Respondent does not point to any part in the record where the parties agreed that transaction costs should be considered on the marital property. The agreement was on capital gains tax consequences on the rentals which the court correctly stated was applicable. However, the court used its discretion to exclude the tax consequences. There was no speculation about the capital

gains tax. It was established by law to be 28% at that time. By respondent's reasoning, everything passed by Congress and established as law is speculative because it is subject to change. Income tax rates are also speculative and courts should ignore them. Obviously, that reasoning does not make sense.

RESPONSE TO ANSWERING BRIEF ARGUMENT III.

The record at A77-A79 or B33-B34 reflects the following:
THE COURT: The 52D the petitioner filed indicated that the testimony would be with regard to ownership and the value of the property. Is that what you are offering his testimony?
MR OSEI-AFRIYIE: Yes, Your Honor, he's going to indicate his conversation with Grace about the ownership of that property...
THE COURT: Well what would be the nature of this testimony be?
MR OSEI-AFRIYIE: I, the person is going to testify to the fact that there was conversation between him and Grace about the ownership of the property...
THE COURT: Which of the two witnesses you suggest in your 52D would be offering this testimony?

MR. OSEI-AFRIYIE: Dr Michael... He has knowledge that the property belongs to Grace...

Respondent again only quotes part of the record from the September 11, 1996 letter to Ms. Vari and fails to mention the sentences immediately preceding the quoted portion which are:

(4) I intend to call the following persons who were physically/ personally involved in Ghana in building the house to testify about the ownership of the property in Ghana:

(a) Dr. Michael Owusu- Akyaw, Ph.D.

Dr. Owusu- Akyaw will testify that Grace told him in November 1993 that she was building a house for herself in Nyinahin, Ghana. A189-A190.

Thus Dr. Owusu-Akyaw was to testify about the ownership of the Ghana property based on his knowledge and fact. He was also to testify about the value of the property based upon his experience and knowledge, and fact. His testimony would not have been cumulative. Petitioner did not testify about his opinion about property ownership in Ghanaian villages. He testified about his experience and knowledge concerning how property is acquired in the villages and about the fact that respondent had told him she owned the property. A66. This was unrebutted.

Rules of Evidence and Agreement

Respondent is under the impression that there are no exceptions to rules of

evidence. However, under Delaware Rule of Evidence (D.R.E.) 804(a)(5), unavailability as a witness includes situations in which the declarant:

> Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

In determinng whether the trial court abused its discretion, it is necessary to examine the facts in each case. Younger v. State, Del. Supr., 496 A.2d 546,550 (1985). In the instant case, the following facts are relevant:

(1) The witnesses are in Africa which is thousands of miles away from Delaware.

(2) The trial Court on July 3, 1996 stated that in view of the fact that the amount in controversy was small, it would not be prudent to bring any witnesses from Ghana.

(3) Following the July 3, 1996 hearing Ms. Vari wrote to petitioner and suggested allowing telephonic testimony from Ghana. A188. Petitioner agreed. A191.

(4) Upon receipt of petitioner's response, Ms. Vari called him to clarify what he meant by ``I do not, however, agree that you can call anyone to testify on your client's behalf.'' Petitioner told her that she could not call anyone from the street to testify. But anyone she called should have knowledge about the ownership of the Ghana property. Ms.

Vari agreed and told petitioner that she would send him the names of the witnesses and a description of the nature of their testimony. Petitioner did not hear from her after a long period of waiting. The lack of response prompted petitioner to remind her in a subsequent letter. A196, last paragraph. Ms. Vari **NEVER, NEVER** responded.

(5) Petitioner contacted his witnesses and was unable to obtain their presence in Delaware.

(6) The witnesses were beyond the supoena power of the trial court.

(7) The witnesses agreed to testify by phone from Ghana.

(8) The trial court and respondent were informed about paragraph 7 days before the trial.

(9) The trial court and respondent were again informed through petitioner's 52D.

> Husband will arrange to have Dr. Michael Owusu-Akyaw and Ernest testify by phone from Ghana about the ownership and value of the property in Ghana.

(10) Respondent did not oppose it in her 52D.

(11) The trial court brought a telephone into the courtroom.

(12) Written statement from Dr. Owusu-Akyaw about the ownership of the Ghana property was on record months before the trial. A183.

There was an agreement to allow telephonic testimony. Moreover, this Honorable Court has stated that a determination of whether the witness is unavailable rests within the sound discretion of the trial court. Younger, 496 A.2d at 551. In this case, the record reveals the court found that the declarants were unavailable. Hence, it would have put form over substance to have asked petitioner to attempt to contact those people where it was highly unlikely they would have voluntarily appeared and they were beyond supeona power of the court. Therefore, discretion is abused by denial ``when there is reasonable probability that substantial prejudice may result from a ... trial.'' Bates v. State, Del. Supr., 386 A2d. 1139, 1141 (1978).

Respondent argues that the Court indicated that telephonic testimony is ``...fraught with peril because of the reasons...stated on the record yesterday.'' Those reasons, according to respondent, ``included concerns about the proper administration of oath, the effectiveness of cross-examination and what effect of sworn testimony is in Ghana.'' Answering brief, p.32. This Court may want to question whether Ms. Vari did not know the ``peril'' when she suggested allowing telephonic testimony.

Petitioner recognizes that the effect of the Confrontation Clause is to provide an accused with certain protections at

trial: witnesses must testify under oath; the accused can cross-examine the witnesses; the jury can observe the witnesses' demeanor. California v. Green, 339 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970). However, *Green* does not overturn the established law that the Sixth Amendment permits the introduction of evidence through some exceptions. As the 3rd. Circuit stated in United States v. weber, 437 F.2d 327, at 339:

> `` ...We do not read *Green* to mean that an accused must have the benefit of such protections even when it is physically impossible for the Government to bring the witness to trial.''

Therefore, under the circumstances and considering the futile efforts made by petitioner to bring his witnesses from Ghana, the denial by the trial court to allow telephonic testimony was an abuse of discretion. Petitioner was, therefore, denied due process of law and a full and fair opportunity to litigate the issue. This resulted in substantial prejudice against petitioner.

Contributions as gift

It was respondent's burden to prove her contributions to the Ghana property were a ``gift'' to her parents. Respondent did not introduce any evidence to show disclosures were made to the Internal

Revenue Service that the contributions were a ``gift''. She also did not show any evidence that her parents paid gift taxes on the sums so received. See Schumeusser v. Schmeusser, Del. Supr. 559 A.2d 1294, at 1300.

RESPONSE TO ANSWERING BRIEF ARGUMENT IV.

Respondent now agrees with petitioner that the parties did maintain **joint** and **separate** accounts. Petitioner's argument is that the funds in all accounts are marital and that was why he spent more money to acquire the 25 and 17 Spruance properties. He also spent funds from his accounts to install fence on the 13 and 15 Spruance Road properties, A150, and to repair all the properties, A150. Petitioner also bought the mower and the funiture in their marital home in 1988. Brief p. 7. Again, in February 1985, he withdrew the proceeds from the sale of the Nissan he had purchased from Brussels, Belgium in December 1979 for $8,000 and gave the money to the maternal grandparents to be spent on the children. The Nissan was a non-marital asset. The children were supposed to stay with the grandparents for more than a year but they caught malaria and petitioner had to go and bring them back to the U.S. in July 1985. Brief pgs.6 & 7.

The parties bought their first rental property in May 1991. The last one was acquired in September 1992. From May

1991 until March 1996, the parties jointly managed the properties with petitioner shouldering a disproprtionate share of the burden physically and financially. Even when respondent unilaterally took control of collecting the rent and depositing it into her individual account, petitioner continued to spend money from his individual accounts to maintain and repair those properties. A7-A11. An example is the payment of May 1996 mortgage on the 17 Spruance Road property by petitioner when she was ``managing'' all the properties and there was no tenant in that property. Petitioner had asked her to use the balance of the positive net rent income from the other properties to pay that mortgage but she refused. Although she refunded half to petitioner from the rent she collected from the next tenant, the half paid by petitioner came from his account while rent coming to him was zero. On the contrary, the half paid by respondent came from the joint rental income. Petitioner again spent money from his account for expenses on 17 Spruance Road in September and October 1996, A9, when supposedly she was the sole `manager' of that property and she collected the rent and deposited it into her individual account. This conduct of petitioner by his actions towards 25 and 17 Spruance properties meant joint management by both parties.

Respondent's response that she paid petitioner the same amount she had withdrawn from the joint account in violation of 13 Del. C. Sec. 1509(a)(1) is incorrect. Indeed, upon cross-examination, petitioner stated that respondent withdrew more than half and whatever money remained in the account he spent it on the rental properties. A(R.B)3-4; supplemental transcript, pp.66-67.

Counsel's statement that he corrected the discrepancies in Rule 16 report (prepared by respondent) and Rule 52D report (which he prepared) is **FALSE**. In the Rule 16 report, A212, respondent lists her account balances totalling over $27,000. During discovery, it was discovered that the balances totalled more than $37,000. A summary of her balances was stated by petitioner in his 52D. Also see A175-A179. Counsel received a copy of petitioner's 52D before he prepared respondent's. Counsel also had A175-A179 with him because those pages originated from his office. Respondent's 52D is at A25. Counsel lists the following account balances for respondent:

Wilmington Trust CD	$10,155
PNC Checking	$1,988
PNC Saving	$2,810
	.....
TOTAL	$14,953
	.....

At trial, the court found respondent's account balances totalling over $38,000, at A30. This is more than two times the amount counsel states in his 52D. It is important to note that counsel, at B4-B10, does not specifically point out how he corrected respondent's discrepancies. Petitioner proved at trial that there were omissions by counsel and showed evidence to the court as indicated at B8-B9, hence the court's findings at A30.

Also in respondent's 52D, counsel included some equity loans on the marital home and the 17 Spruance road property. These equity loans did not exist. Counsel **points to NO EVIDENCE** from the record where he corrected respondent's numbers to arrive at those loans. Does he know the loans on the properties more than the owners who pay the loans? He also reduces the amount of money petitioner contributed towards the acquisition of the marital home and increases respondent's contribution. Lastly, petitioner does not have a Ph.D. B-1. He stated that he had completed Ph.D. coursework. Completion of coursework does not lead to the award of a Ph.D. The candidate has to write and pass comprehensives. After that he/she has to write a dissertation, defend and pass it. It is obvious that had petitioner died before this case went to trial, the numbers would have been skewed in such a way that his heir would probably have inherited negative asset and owed

respondent. Petitioner is glad he is alive.

Respondent concedes the trial court was wrong in stating that the Board has been subject to **several** earlier sunset dates. Presumably, this time counsel read the history of Chapter 93 of Title 16 which he did not want petitioner to state at trial.

Counsel's description of the parties' duplex is wrong. 13 and 15 Spruance Road were previously owned by two separate individuals; 13 was owned by Mr. Herbert Lubitz from Wilmington, Delaware and 15 was owned by Mr. Martin Bernadinis from Pennsylvania. They used to manage their units individaully. Each unit has its own separate utility meters. Did counsel contact the City of Dover before he wrote the answering brief? Each unit has its own roof. Repairs are done separately. There is a solid wall separating the units. Did counsel consult his client before he wrote this? The duplexes on Spruance Road are not like old houses that have been converted into two -family dwelling units.

RESPONSE TO COURT ORDER

The trial court also issued a second Order on November 15, 1996. Docket entry, A2. Respondent did not fully comply with that Order. She refused to provide

documentation on one Wilmington Trust account. See A185-A186, A191, A194-A197.

March rent check and control

Petitioner mentioned the March 1996 Delaware Housing Authority (Section 8) rent check for 13 Spruance Road property to show control in the relationship. In fact, as a further manifestation of this control, see A151-A152. Therein, respondent indicates that she be awarded 153 Royal Grant Way property because she paid more of the downpayment. But she did not want petitioner to be awarded 25 Spruance Road property even though he paid more of the downpayment on that property.

Why is it **equitable** to award the marital home to respondent because she paid more of the downpayment **but inequitable** to award 25 and 17 Spruance Road properties to petitioner because he paid more of the downpayment on those properties? Lastly, why is it **inequitable** to award petitioner **57%** of the marital estate because he spent a disproportionate amount of his resources (physical, financial and mental) to acquire, preserve and maintain all the marital assets?

CONCLUSION

This Court has long recognized that a Family Court Judge works under very difficult circumstances, but cautioned against misuse of power stating:

> The court and its power are solely the result of statute, and when proceeding on what is perceived to be an equitable basis, the trial judge could not do so in disregard of the law or in violation of the rights of the litigants. Abel, G.S. v. Badrban, H.K., Del. Supr., 453 a.2D 94, 97 (1982).

Furthermore, while recognizing that the impact of the Family court's order on the future life of former spouses as they go their separate ways after days or decades of marriage can be enormous, this Honorable Court gave the following warning:

> It is, therefore, essential in the public interest that Judges of the Court who exercise its statutory power...apply the same basic approach in the administration of Sec. 1513. Husband, id., 410 A.2d 153, at 158.

If a Family Court Judge fails to to the above, this Court stated:

> ``... We cannot avoid our responsibility for consistency in the administration of the law.''

For reasons expressed and upon the authorities herein, petitioner requests nothing more or nothing less than consistency in the administration of the law.

Francis Osei-Afriyie
P.O.Box 185, Dover, DE 19903-0185
Petitioner-Below,Appellant
Pro Se
Dated: 12/3/1997

IN THE FAMILY COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

FRANCIS OSEI-AFRIYIE,	:	
Petitioner,	:	Petition No.
v.	:	95-13580
GRACE A. AMPOFOH,	:	File No.
Respondent,	:	CK95-3472

RULE 52

COMES NOW, GRACE A. AMPOFOH, ``Wife'' by and through her attorney, Gerald I.H. STREET, ESQUIRE, who submits the following in compliance with Family Court Civil Rule 52.

I. PROPOSED FINDINGS OF FACTS, CONCLUSIONS AND SUPPORTING REASONS

A. Statutory Factors Set Forth Under 13 Del. C. Sec.1513 are as follows:

1. The length of the marriage.

The parties were married on February 10, 1980. They separated on or about January 1, 1995. A final decree in divorce was entered on August 3, 1995, whereby the parties were married for a little over 15 years.

2. Any prior marriage of the parties.

Neither of the parties had previous marriages.

3. The age, health status, amount and sources of income, vocational skills, employability, estate liabilities.

Francis Osei-Afriyie, ``husband'' is 49 years of age. He has a Ph.D. in Economics and an MBA in Health Care. Husband has been employed at the State of Delaware's Bureau of Health Planning and Resources Management since 1988. Huaband's present monthly gross income from employment only is approximately $3,000.00

Wife is 45 years of age and suffers from numerous health problems, the most serious of which is that she is diabetic and is insulin dependent. Additionally she has been diagnozed with degerative arthritis.

Wife is a RN and has worked during the marriage as a nurse. She is presently employed by the State of Delaware at the Hospital for the chronically Ill and has a present monthly gross income from employment only of approximately $3,500.00

4. Whether the proposed award is in lieu of or in addition to alimony.

Neither party has requested alimony.

5. The opportunity of each for future acquisitions of capital assets and income.

The parties are in relatively equal circumstances at this time, ref the opportunity of each for future acquisitions of capital assets and income.

6. The contribution or dissipation of each party in the acquisition, preservation or appreciation of the marital property including the contribution of a party as a homemaker or husband.

(a) At the very beginning of their marriage husband announced that wife was expected to earn her own income, and to support herself by paying (1/2) of all joint expenses. They have shared routine monthly living expenses and the cost of capital acquisition this way to the present date. They even acquired another property - post divorce, jointly by each contributing (1/2) of the purchase price and settlement costs.

(b) The one exception to this procedure was the marital home; 153 Royal Grant Way. The full downpayment of approximately $10,000.00 was provided by wife from her individual savings while the settlement costs of approximately $2,500.00 were paid by husband. Thereafter, the expenses to maintain and

repair the house were shared equally. Therefore, each should be awarded an amount in proportion to their initial, abeit unequal contribution of 75%/25%.

7. The economic circumstances of each party at the time division of property is to become effective.

As stated above, the economic circumstances of each party are relatively equal.

8. Whether the property was acquired by gift, except those gifts excluded by Sec(b)(1) of this Section.

Husband is expected to claim that property in Ghana is marital. Wife will refrain at this time, from explaining her opposition in detail, except to say that any contributions she made to land in Ghana was from her individual funds (see par. #11) with husbands knowledge years before their divorce, without any opposition from husband and was intended as a gift to wife's father.

9. The debts of the parties

Debts are set forth on the attached Exhibit ``B.''

10. Tax consequences.

Both parties agree that capital gains tax consequences and sale sale costs should be taken into consideration on all real properties.

11. Other considerations

(a) Both parties made contributions to their pensions, but, because their salaries were not exactly equal, in unequal amounts as required by State pension laws. However, the unequal amount of contributions made by each party to their deferred compensation accounts, was pursuant to their own choice. Wife chose to save more and since she suffered the consequences of her frugality once, she should not have to pay any portion to husband who chose not to be frugal.

(b) Divide household furnishings using the two list method.

II PROPOSED ORDER

Taking into consideration the statutory factors set forth in 13 Del.C Sec. 1513, it is hereby ordered as follows:

1. Award the marital home to Respondent, but give credit to Petitioner of 25% of the net equity, as well as #17 and #25 Spruance Road and she will accept complete responsibility for the payment of all mortgages, debts and liabilities associated therewith;

2. Award #13 and #15 Spruance Road to Petitioner and he will accept complete

responsibility for the payment of all mortgages, debts and liabilities associated therewith;

3. Award Petitioner an amonut necessary so as to balance the net values of the rental properties;

4. Each party to retain 100% of their own pension and deferred compensation plans;

5. All bank accounts should be awarded to the person in whose name the account is titled and no credit given to either to equalize the account balances. All accounts with the children's names should be joint accounts under both parties' names.

6. Each party to retain the automobile they are presently driving and be responsible for any indedtedness or liability associated therewith;

7. Respondent to waive any interest she may have in 24 Forest Drive and Petitioner to waive any interest he may have in Respondent's Father's property in Ghana;

8. Petitioner to pay Respondent the sum of $2,500.00 for reimbursement of attorney's fees.

TWILLEY & STREET, P.A.

BY: /S/.....
Gerald I.H. Street
Attorneys for Respondent
426 South State Street
P.O.Box 1366, Dover, DE 19903

Dated:

SCHEDULE OF ASSETS

ITEM #	Property Description	Fair Market Value	Husband	Wife
1	Marital Home:			
	153 Royal Gt.Wy.	$128,000		
	PNC Mtg	-$68,869		
	Equity Line	-$12,584		
	Transactions costs	-$8,960		
				$29,920
	Subtotal		0	$29,920
2.	Rental properties:			
	13 Spruance Road (Sp. Rd.)	$60,250		
	Boatman Mtg.Co.	-$31,897		
	Tax & trans.costs	-$10,399.17		
			$17,959.83	0
	15 Sp.Rd	$60,000		
	Fleet Mtg. Co.	-$32,587		
	Tax & trans costs	-$7,975.67		
			$19,437.33	0
	17 Sp.Rd.	$65,000		
	CoreState Bk. Mtg	-$49,259		
	Corestate Equity	- $2,200		
	Tax & trans costs	-$11,200		
			0	$2,341

ITEM #	Property Description	Fair Market Value	Husband	Wife
	25 Sp. Rd.	$60,000		
	Wells Fargo	-$40,209		
	Tax & trans costs	- $7,239		
			0	$12,252
	Subtotal		$37,397.16	$14,593
	GRAND TOTAL		$37,397.16	$44,513
3.	Deferred comp.		$7,470.69	$13,400
4.	Household furnishings		----	----
5.	Motor vehicles:		$4,725	$4,726
6.	Bank Accounts:			
	a. PNC (#D615617)	$10,000		
	b. PNC - Cking	$3,558		
	c. Merrill Lynch	$5,096		
	d. Mellon Bank	$5,145		
	e. WTrCo. CD 0057533638			$10,155
	f. PNC (Cking #5601005395)			$1,988
	g. PNC (Svg #5701005392)			$2,810

Permit wife 3 months after sale of Hancock property and distribution of proceeds tc pay husband any balance deemed owed by the Court.

EXHIBIT ``A''

13. (k) The value of property set apart to each party.

Husband requests 57/43 allocation of the marital assets in recognition of Wife's superior income and earning capacity, uncertain future employment, multiple medical conditions and future escalating medical expenditures.

ORDER

Based upon the foregoing Findings and Conclusions, IT IS ORDERED as follows:

1. Marital real estate shall be valued and distributed taken into consideration section k and as seth forth below:

Wife shall keep the following real estate:

a. The marital residence located at 153 Royal Grant Way.
b. 13 Spruance Road rental property.
c. House in Ghana.

Husband shall keep the following real estate:

a. 25 Spruance Road rental property
b. 17 Spruance Road rental property
c. 15 Spruance Road rental property

2. Wife shall first select the items she wants to keep from the list on pages 13

and 13(a) of the Joint Asset Report. Husband shall then select what he wants to keep from the remaining items. Whatever is left shall be sold. Section k allocationshall apply.

3. Other assets including automobiles, bank accounts, deferred compensation and pension shall be divided considering section k allocation.

4. Considering section k allocation and depending on which items Wife decides to keep, Wife shall pay Husband $.....

5. Each party shall execute any documents necessary to implement this Order.

BY: /S/.....
FRANCIS OSEI-AFRIYIE
(PETITIONER)
P.O. BOX 185
DOVER, DE 19903-0185

.....

MR. OSEI-AFRIYIE:... The respondent wants to be awarded 25 Spruce Road and 17 Spruace Road for the simple reason that we have been managing those properties separately. Indeed I don't have to go through this but I can tell the Court that that was'nt my choice. But I didn't have anything to do with it because if I objected to it (unable to hear words). So management that's not mean ownership. The

mere fact that you manage a property doesnt't mean that you have the legal right to have it. I am (unable to hear words) asking the Court to award me, award the petitioner his legal expenses and his fees to Mr. Owens. And the reason is the parties met and the $128,000 was put on the table. The respondent was given a copy of the appraisal and the (unable to hear word). The respondent did not accept the appraisal. Consequently, petitioner hired Mr. Owens and paid him $300.00 to be here just for the respondent to back on the (unable to hear word) and to say that now won't accept $128,000.

MR. STREET: Your Honor, I'm gonna object to any further or any further argument about this. This is beyond the scope. This is rebuttal which is beyond the scope. But more importantly, the rule 16 report neither party requested attorney's fees. I noted that and that's why you did not find me arguing for attorney's fees. I believe the Court practices that it can't be brought up at this point.

MR. OSEI-AFRIYIE: Your Honor, I believe in closing of case a party can ask for in Delaware' Code Section 1515 (unable to hear word) provided that after considering the financial resources of both parties the Court may order that party to pay all or part of of the cost to the other party of maintaining or defending in a proceeding under 13. In addition, the Delaware Supreme Court has

ruled that the Court may also order a party who has been (unable to hear word) or unreasonable to pay a portion of the party's fees. There were attempts set on this case. There were also correspondence between...

THE COURT: There is objection on the floor and this a rebuttal. It is beyond the scope of rebuttal. I certainly can't consider anything outside of the record. I will take into consideration representations that were made this morning with regard to how it is Mr. Owens got here and under what circumstances he got here.

MR. OSEI-AFRIYIE: And , Your Honor, you, the Court may also want to consider that that is on record the fact that the petitioner promptly responded to all the discovery materials to the respondent. But the petitioner had to file two motions here because no matter in all his efforts were turned onto deaf ear. And it has been frustrating to the (unable to hear words) and as you so the last letter I send to the respondent's attorney was not even responded to. And I think they have been unreasonable to me and they have listed my resources and I believe taking the law into account I deserve to be reimbursed. And lastly, the Court should consider that 13 Delaware Code 1513 actually itv says a marital property is established on the day of marriage. Whatever you acquired is put into the marital pot. And in that is included

pensions, paychecks, savings and whatever. So the argument that one person had been frugal which is not true because I have contributed to the best of my ability should not be taken seriously. The law is the law. And the law should guide the decision of this Court. Thank you very very much.
THE COURT: Thank you very much. Alright I'll this matter under consideration.
.....

MR. STREET: And the bills, the other bills you split. Now after you worked at Queens Park for about how long, you already told us. I'm sorry. I think we're up to about 1984 and where did you work next?
MS. AMPOFOH: I didn't work from then because I had cesarean section with Monica, was premature. So seven months I wasn't working.
.....

Mrs. Grace Osei-Afriyie
153 Royal Grant Way
Dover, DE 19901
June 11, 1993

Dear Mr. Sarfo:

It shouldn't surprise you to hear from me at this period in time of our lives. I had wanted to write earlier after Osei-Yaw came from Ghana. I am expressing my sincere thanks and gratitude to you for your assistance in Osei-Yaw's father's funeral. I knew, and

Osei-Yaw's father's funeral. I knew, and I told Yaw that you will be there for him. I don't know your mailing address so I decided to write to mother and enclose yours for hand delivery. I would like you to write to me as soon as possible.

Kwame, I have been strongly advised by Osei-Yaw to contact you for assisting me to complete my house in Nyinahin. You have to help my mother to have a place to stay. I shall be sending you money if you offer this important help in my life. My 2 daughters want to visit Ghana, but you and I know, I don't have a room in Nyinahin for even a night. Osei-Yaw suggested your brother is a bricklayer and that we can use him to help. What do you think? My father started the house but couldn't complete it probably due to physical weakness. Cantact him and motherfor where the house and the land are, and we can start from there. I need``toilet'' like Dante's toilet for his mother's house. Yaw wants you to contact Dante for advise.

Kwame, write soon to let me know if you can offer your time for me in this project. How is your wife(my cousin) and the children? How many children do you have at present? God bless and guide you in life and all your undertaking. Ending with greetings from all of us to you all.

Yours Grace.

To: From:

Mr. Kwame Sarfo. Atea, U.S.A.

(Nkwanta)

.....

MR. STREET: The first incident you talked about involved a suitcase of clothes.
MR. OSEI-AFRIYIE: Yes.
MR. STREET: For a daughter that turned out not to be your daughter?
MR. OSEI-AFRIYIE: Yes.
MR. STREET: Are you asking the Court for compensation for the value of that suitcase?
MR. OSEI-AFRIYIE: That yes, that should be included because we all bought the clothes.
MR. STREET: And this was done in February of 1985?
MR. OSEI-AFRIYIE: Before February but I took them to Ghana in February'85.
MR. STREET: Did you bring the clothes back with you?
MR. OSEI-AFRIYIE: No I left them there.
MR. STREET: You left them there.
MR. OSEI-AFRIYIE: Yeah I gave them to the father to be given to the daughter.
MR. STREET: To the daughter you knew was't your daughter?
MR. OSEI-AFRIYIE: Yeah I didn't know at that time. If I had known do you think I would have taken the suitcase there?
MR. STREET: When did you find out this girl was not your daughter?

.....

THE COURT: What evidence is there in this record that Ms. Ampofoh went to anyone with a bottle of schnapps or otherwise to which she acquired this real estate herself? What evidence is there in this record?

MR. OSEI-AFRIYIE: Herself. As I explained we don't do that. If I want to build a house now I send money to Ghana and my parents can do that. They go to the chief. They go and show them. And then tell you, the land you want.

THE COURT: But the testimony that I have heard with regard to the acquisition of this property is that her father acquired it.

MR. OSEI-AFRIYIE: No that is what she is sending money to her father to go to the chief to do that. That is how we do it. And where did the money come from. The money was from marital property. Okay if it was a gift the the(unable to understand words) has to be taken into account.

THE COURT: Are you arguing to me that if she sends the money and her father goes to the chief that the chief is going to recognize that she owns the property and not her father and...

MR. OSEI-AFRIYIE: That is how they do it. You go there and you tell the chief that my daughter or my son, like they'll mention my name Osei okay in the U.S. wants to build a house and go and show us the land. That's is how they do it. And the the chief will appoint someone to

take you to the bush and show you the property.

THE COURT: And you are arguing it under Ghana law that her father has no ownership interest...

MR. OSEI-AFRIYIE: Oh no no no. The village looks, the father doesn't have an ownership interest. All the father has, they try to help your children overseas to acquire property in Ghana. The father has his own house. He's got his own house even with family. As a matter of fact now he has moved to the village. And the parents take pride in it, they takes pride for helping your children overseas acquire properties. You see them mention on the street, oh this house belongs to my daughter. And in other words they say oh your daughter is doing pretty good. Well she has testified in Court that she's been sending money to get the house completed. And she has also testified that it is her house. She's denied that it is her house. She's denyiny. Your Honor, in the cross examination I asked the respondent whether or not she has a building in Ghana. She says she doesn't have any building in Ghana. Then I have her come to the desk and then show her the letter and then she read it into evidence that, indeed, she has a house in Ghana...

.....

MR. STREET: ... We would like to be awarded the marital home and we will

adopt the , well we have adopted the statement of value and the balance and the mortgage. We would suggest that the sale costs and capital gains tax either be inputted or be excluded on all the properties to be consistent. We would also ask the Court to award properties #17 &25, the rental properties for reasons I'll explain and cash buyouts a little bit later. The bank accounts, pensions and deferred compensation accounts values if you will, well I strike that, they have different values. We suggest the values should not be apportioned or offset in anyway. Because it is clear from testimony unrebutted, I would remind the Court, that the contributions to the pension plan, the deferred compensation plan and the amounts retained in savings and bank accounts were because of individual efforts at savings of spending money by individual accounts throughout the entire history of this marriage. The Court should not be tempted to be pulled back into the marriage for years, even decades, to second guess spending habits when nobody was second guessing their own spending habits. They were following an agreement they made. That part of the testimony was essentially unrebutted that there were individual accounts throughout the marriage although some of the testimony about when there joint accounts from time to time... Mrs. Ampofoh should be awarded greater than 50% and the way

saved. She was more frugal than Mr. Osei-Afriyie. Also unrebutted was her description of the medical that Mr. Osei-Afriyie has graded a lot of concerns about his future. The interesting part is that the house bill he showed to Your Honor showed that the sunset time period was to be extended. And whether or not it's going to be extended again, he naturally is fearful as an employee but its purely speculative as to whether it may or may not. And if it is in fact sunsetted, it is pure speculation but for some reason he won't be able to find equivalent paying work...As far as the expenses involving Ghana even though Your Honor has ruled that the property itself is not marital property, Your Honor has ruled that the contributions made will be taken into consideration for at least at that point of your Honor's ruling. We suggest that the consideration that should be given to those monies should be zero...

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